

FOREWORD

**ISLAMIC LAW IN
MALAYSIA**
ISSUES AND DEVELOPMENTS

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FOREWORD

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This is a book on Islamic Law in Malaysia. The inference is of course Islamic Law in other Muslim countries are different. In fact every Muslim country has its own interpretation of the teachings of Islam, which leads to differing Islamic Laws. Since Allah S.W.T. through Muhammad, His Prophet gave to mankind only one religion of Islam, how is it that there are so many different laws in different Muslims countries? Indeed even in one country there are different views, sometimes very radically different views on Islamic Law. The only answer must be the difference in the interpretation of the teachings of the Quran and Hadis by the learned in Islam, the ulama. There is a distinct possibility that some of these interpretations at least may be wrong. The interpreters, no matter how learned they

may be are mere humans. They are not prophets and their being wrong in some of their interpretations does not mean that they are wrong in their other interpretations.

This book by Dr Mohamad Hashim Kamali reflects the moderate approach of the author in his discussion of opposing views on various issues relating to apostasy, the hudud punishments, family law matters, women and work, development in Islamic banking and insurance, the kharaj tax etc. For concerned Muslims in this country and elsewhere, this book provides an insight into the problems that Muslims face in a world dominated by non-Muslims in the social, economic and political fields.

In a shrinking world where Muslims can no longer isolate themselves, it is necessary for Muslims to understand the complexity of the problems they face. This book can help them to appreciate the situation and to debate intelligently on their interpretation and approach towards these problems.



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Note on Spelling of Arabic and Malay Words

The reader will note some variation in the spelling of words that are common between the Arabic and Malay languages. "Shari'a" in the running text is sometimes spelled with "sy" as "syariah" and so is "*nushūz*" which is frequently spelled as "*nusyuz*". When the latter versions occur in documents and court decisions, which I might have quoted, I follow the spelling that I find in my source. Again the Arabic word "*ta'līq*" is usually rendered in Bahasa Malaysia as '*taklīq*'. If my source spells it as such, I retain the local spelling, but I follow the Arabic spelling otherwise. And lastly, words such as *faskh* and *waqf* do not take a second "a" in their Arabic rendering whereas they do in the Malay version, which renders them as *fāsakh* and *waqaf* respectively. And lastly, the guttural Arabic letter 'ayn is often rendered as 'k' in the Malay language – as in *taklīq*, *dakwah* etc.

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CHAPTER ONE

Introduction

Information and developments of interest to Islamic law in Malaysia that are discussed in this chapter include the pluralistic character of Malaysian society, Islam as a reality of Malaysian life, political configuration of Malaysia with references to UMNO and PAS, family law reform, and Islamisation.

Malaysia is a multi-racial and multi-religious country, having among its 21 million population no fewer than 178 ethnic groups. About 11 million (or 55 per cent) are Malay Muslims, although there are also Muslims of Indian and Chinese descent that make up the total component of Muslims at 58.6 percent. Non-Muslims constitute about 40 per cent of the population which consists mainly of Christians (8.1 per cent), Buddhists (18.4 per cent) Hindus (6.4 per cent), Confucians and others (5.3 per cent). Members of the indigenous tribes of East Malaysia (Sabah and Sarawak) and the aboriginals of West Malaysia have animistic beliefs, although many Dayaks, Ibans and Kadazans of East Malaysia have converted to Catholicism.¹

1 *Statistics Malaysia*, January 1997, p.5, and *Statistics Malaysia*, 1995; see also Andrew Harding, "Islamic Law in Malaysia", in Cotran ed. *Yearbook of Islamic and Middle Eastern Law*, 1996, Vol. 2, p. 61.

The pluralist character of Malaysian society and politics is made visible by the fact that more than one-third of the Malaysian Parliament and its Federal Cabinet remain non-Malay and non-Muslim, and there is considerable non-Malay participation in the public services and government agencies.² This still leaves the Malays in the dominant position in the government and in the ruling party, UMNO (United Malay National Organisation). Malaysia's politics of realism and accommodation have also been manifested in the fact that it is, officially at least, a secular state which has not embraced the idea of establishing an Islamic state, nor does it have any agenda of developing a Sharī'a – based constitution. These are precisely what the main opposition party, the Islamic party of Malaysia, commonly known as PAS, has consistently demanded but failed to realise, notwithstanding the fact that PAS has, since 1990, become the ruling party in the state of Kelantan.

Due to a variety of factors that will later be explained, from the viewpoint of Islamisation and Islamic revivalism, Malaysia presents a mixed picture of divergent influences that tend to pull the country in different directions. The most influential ingredient of this picture, which has remained in the centre-stage of Malaysian politics, is the multi-communal factor. Thus, according to one commentator, "very little of any political importance that goes on in that country is not influenced by the ethnic and religious diversity that is to be found" among its diverse population.³ Another commentator noted that it was very likely that the policy of accommodating

2 Cf. Muzaffar, "Tolerance in the Malaysian Political Scene", in Alhabshi, *Islam and Tolerance*, p. 143.

3 Mehden, "Islamic Resurgence in Malaysia", in ed. Esposito, *Islam and Development*, pp. 163-164.

non-Malay interests and of balancing ethnic needs and aspirations would remain "a most crucial and challenging aspect of the Malaysian political system".⁴ The communal factor extends beyond relations among the ethnic groups and permeates the politics in each ethnic group, the Malays, Chinese and Indians. Almost every political party in Malaysia, whatever its declarations, has tended to operate as a communal party. Malaysian politics has been consequently unable to rise significantly above ethnicity and communalism, although economic affluence in the latter part of the Mahathir administration has had a diminishing effect on the role of ethnicity in policy making. The coalition government, the *Barisan Nasional* (National Front) and its component political parties are communal-based, and draw upon the support of their respective communal groups for their survival and influence.⁵ Colonialism has evidently played a role in the promotion of ethnicity and communalism. As Malays were regarded as indolent and lazy, this was used as an excuse to bring in Chinese and Indian immigrants, so as to enable the operation of the "divide and rule" policy as well as to advance colonial economic interests. Malay peasants were forced to produce a surplus rice crop and were discouraged from cultivating other cash crops which could weaken the British capitalist hold of the plantations. Frustrated by the poor response of local Malays, the colonial administration branded the Malays as indolent and irrational.⁶

Colonial policy, thus, aimed at reducing the traditional role and status of the Malays. This was done partly by encouraging large numbers of Chinese and Indians to work in

4 Muzaffar, "Tolerance in the Malaysian Political Scene", p. 144.

5 Cf. Mutalib, *Islam in Malaysia*, p. 105.

6 See for details Sundaram, *A Question of Class*, p. 56.

the tin mines and on the plantations. Britain's "open door" policy also encouraged "an unlimited flow of Chinese into Malaya."⁷ By the beginning of the twentieth century, the Chinese formed 65 per cent of the population of Selangor, twice that of the Malay population, and 46 per cent of the population of Perak, where they were about equal in number to the Malays. The 1921 census revealed that Malays were already outnumbered by ethnic Chinese and other non-Malays. This was later restricted under the 1933 Aliens Ordinance to the monthly intake of 2,300 migrants.⁸ By independence, the demography of Malaya had been so transformed by the British that the Malays found themselves barely a majority and totally excluded from the economic mainstream of their country. Due to the large number of migrant workers and Europeans, each asserting their own religious beliefs, customs and values, and the influx of missionaries who had been expelled from China in the early 1950s, the Malays felt their ethnic and religious identity was at stake. There was, as a result "a profound sense of insecurity on the part of Malays over the emasculation of their patrimony."⁹

The next most important factor of Malaysian society and politics is clearly Islam. To the Malays it is almost unthinkable to be anything but Muslim and they expect their government and its legal structure to protect that identity. Within Malay society there is an integrated perception of religion, traditional values and family life, and it is difficult for the Malay to isolate Islam from this whole. The Islamic anchor of Malay identity is reflected in the expression *masuk Melayu* which literally means

7 Mutalib, *Islam and Ethnicity*, p. 29.

8 Cf. Sajoo, *Pluralism in Old Societies*, p. 43; Yousif, *Religious Freedom*, p. 59.

9 Id., p. 44.

to enter the Malay community but is customarily applied to one who converts to Islam. Islam is, thus, used as synonymous to being a Malay. The federal constitution (Art. 160b) defines a Malay, in the context of Malay Special Rights, as one "who professes the Muslim religion, habitually speaks the Malay language and conforms to Malay customs". This definition has been criticised for a certain parochialism in that Islam itself does not recognise ethnicity as a basis of identity. Be that as it may, the federal constitution and also the Malay Reservation Enactments in all the states of Malaysia maintain Islam as a defining element of Malay identity.¹⁰ Article (3) of the UMNO Constitution 1960 also includes, in its statement of objectives "to promote, uphold and safeguard Islam in Malaysia." Malay identity is rooted in Malay custom or *Adat* which has remained strong in Malay society and is applied side by side with Islam. Some writers have even suggested that, due to the strength of Malay *Adat* in earlier times, Islam did not penetrate the social fabric of Malay society as deeply as it could have. Pre-Islamic Hindu practices and animistic beliefs in spirits survived in feudal Malay society and can still be seen in certain Malay ceremonies such as in wedding ceremonies. Sometimes the Malay *Adat* comes into conflict with Islamic law such as in the Negeri Sembilan laws governing aspects of marriage, divorce and inheritance.

The ethnocentric connotations of conversion to Islam in Malaysia has invoked criticism: There is no compelling reason for one to change one's ethnicity and culture in order to become a Muslim. Islam merely requires acceptance of its

10 Malay Reservation Enactments (now State Malay Reservation Act) define a Malay as "a person speaking the Malay language and professing the Muslim religion."

dogma and modification in those areas which are contrary to its ideals. Those aspects of the individual's identity and culture which are not repugnant to Islamic principles may be retained without compromising the integrity of the Islamic faith. Historical records and the present realities of the Muslim world bear testimony to the cultural diversity of Muslims from China, to India, Africa and the Middle East. Muslims of different races, tribes and nations are encouraged to know one another, to retain their identities, and yet to maintain their unity in the essentials of the faith (Cf. the Qur'ān, 49:13). The annual event of the *hajj* provides a tangible proof of Islam's acceptance of diversity beyond question. *Masuk Melayu* should not, therefore, be synonymous with Islam, and non-Malay converts should not be exposed to the need to alienate themselves from their community and culture.

The very legitimacy of the Malay Rulers was, and still is, bound up with both Islam and Malay cultural values. Before the British came to Malaysia, the Sultans in each of their respective states were the heads of religion as well as political leaders. Islamic law was applied side by side with customary law. Islamic law was the general law of the Malay states until the advent of British rule in the late nineteenth century, when the Malay Rulers accepted British Residents as advisors, but retained control over matters relating to Islam and Malay custom. This relatively strong Malay identity with Islam has demanded an affirmative stance on the Sharī'a. Yet to curb the prospects of protest and confrontation from the minorities, Malaysian political leaders had to take a moderate stance on Islam and the Sharī'a if only to keep the multi-party coalition of the three main parties, UMNO, MCA (Malaysian Chinese Association) and MIC (Malaysian Indian Congress), in the *Barisan Nasional* together and present it as a credible front to the nation.

The core of the UMNO leadership in the early years of the party's formation in 1946 came from the traditional elite, aristocrats and administrators, who occupied a privileged position in society. This helped these leaders to feel secure, not just in relation to their own community, but also vis-a-vis the Chinese and Indians living in their midst. However wealthy or educated some of the Chinese and Indians might have been, they did not pose a threat to the superior position of the Malay aristocrats. Within UMNO, there was a stronger pro-Islam movement that was led by its ulema who established the Hizbul Muslimin (HAMIM) in 1948 under the leadership of Sheikh Abubakar al-Baqir. This was the first Islamic party in the country. Its motto was to fight for Malaya's independence, build a Muslim society based on Islamic principles and form an Islamic state. The British were quick, however, to arrest the "extremists" and the party was disbanded. HAMIM was, however, reborn when the Islamic party of Malaysia, PAS, was formed in 1951.

In its constitution of 1960, UMNO committed itself to promote Islam in Malaysia. Various projects were subsequently undertaken such as the establishment of PERKIM (Persatuan Kebajikan Islam) in 1960. PERKIM concentrated on *dakwah* activity and conversion of non-Muslims and their welfare. Then the National Qur'ān Reading Competition was held in 1961. After the communal riots of 1969 UMNO pushed for adoption of policy measures to fight poverty among the Malays, and the government adopted a supportive stance toward Islam which is often referred to as the Islamisation policy. Certain initiatives were taken toward a new societal pact. One such initiative was the *Rukun Negara*, proclaimed by the Monarch on 31st August 1970. It was founded in five principles: belief in God, loyalty to the King and country, constitutionalism, the rule of law, good behaviour and moral

virtue. In the meantime, UMNO was faced with the difficult task of having to please its Malay members and voters on the one hand and to secure support from the non-Malays especially after its alliance with the MCA and MIC on the other.

Traditional Malay opposition to UMNO has been presented by PAS (Parti Islam SeMalaya) which is mainly supported in rural areas and in the East Coast of Malaysia. Being the largest opposition party of Malaysia, it has been variously characterised as "conservative, traditional, populist and chauvinist".¹¹ PAS has always declared itself to be the true supporter of both Malay and Islamic principles. It has criticised UMNO for being unwilling to give its full support to Islam, and has long called for an Islamic state which would help the Malays to conduct their lives in accordance with the norms and principles of Islam.¹² PAS has further maintained that in a genuine Islamic state political power would only be exercised by Muslims since only Muslims would be committed to the creation of a society founded upon the Qur'ān and the Sunna. Since all Malays are Muslim and since there has always been an intimate nexus between Malay and Muslim, PAS was inclined to transfer the concept of Islamic political power to Malay political power and vice versa.¹³ The 26th and 27th PAS Congresses in 1980 and 1981 were heavily critical of the party's ethnic chauvenism and heard calls for "real Islam." In 1982 PAS changed its constitution to create a powerful ulema section which would decide party policy. In the interest of greater Malay unity and under the pressure of events in the post 1969 period, PAS joined UMNO and formed a coalition

11 Von Der Mehden, "Islamic Resurgence", p. 177.

12 Von Der Mehden, "Islamic Resurgence", p. 177.

13 Muzaffar, "Tolerance in the Malaysian Political Science", n. 4 at 130.

government with it between 1974 and 1977. But differences between them mounted as UMNO could not meet PAS demands for a more concerted Islamisation programme.¹⁴ As will later be explained, PAS opposes the government's description of Islamisation as a commitment to the promotion of 'Islamic values.' PAS demands the creation instead of an Islamic state that is committed to the implementation of the Sharī'a in both general and specific terms. PAS has also declared its plan to abolish the distinction between *bumiputera* and non-*bumiputera* and sees the NEP (New Economic Policy) and the NDP (National Development Policy – briefly explained below in Chapter IX) as discriminatory against poor Malaysians. PAS regards these to be advantageous only to certain sections of the community. For PAS, the NEP merely served the interests of *bumiputera* middle and upper classes. PAS thus declared:

An Islamic party must be based on ... the Qur'ān and hadith, and its leadership must believe that only Islamic principles can be the basis of an Islamic state ... Tunku Abdul Rahman repeatedly stated that Malaysia was a secular country and Dr. Mahathir has followed his steps by reaffirming that Malaysia will continue to be secular. Dr. Mahathir himself has emphasised that the government's Islamisation programme is limited in scope.¹⁵

Malaysia differs from both Turkey and Pakistan in that it has neither abandoned the Sharī'a nor has committed itself to making the Sharī'a the dominant force of law and government in its territory. While on the one hand demanding a political

14 Cf. Mutalib, *Islam and Ethnicity*, p. 110.

15 Haji Abdul Hadi Awang as quoted in *Harakah*, 25 June 1993.

and constitutional system that is protective of Islam, the conservative elements in the Muslim community have on the other hand never dominated Malaysian legal machinery and politics. There is a mixed picture, which offers some basis for an Islamic identity in the constitution and government policy and some basis also for a secularist orientation of law and government. The Islamic leanings of this picture tend to be more pronounced when seen through the eyes of the non-Muslims of Malaysia, and yet far too committed to secularity and pragmatism when seen from the perspective of a devout or even moderately religious Muslim Malaysian.

Malaysia has evidently taken an affirmative stance on the implementation of Sharī'a in the areas of marriage, child custody, divorce and inheritance for its Muslim citizens. The Sharī'a has been the applied law of Malaysia in these areas and the pattern here is well entrenched. The beginning of Islamic banking in Malaysia since the early 1980s has also stimulated interest in the revival of the Sharī'a law of transactions and commerce and as of the present writing many of the well-known Sharī'a modes of transactions are currently being practiced in the banks and financial institutions of Malaysia. Malaysian specialists in the field have often spoken of Malaysia as a leading influence in Islamic banking. Islamic banking in Malaysia has certainly moved at a rapid pace and entered a phase of diversification and product design that combine the state of the art in the profession with Islamic principles at a level of sophistication that is decidedly impressive. Although started on a modest note in the early 1980s, Islamic banking and insurance have proved successful almost beyond expectations. Since 1993 Islamic banking windows have also been opened in the conventional banks, a move which marked a milestone of development in the short history of interest-free banking in Malaysia. The policy now is to upgrade these windows to

divisions due to the greater scope and diversity that is now available in Islamic banking operations. This can also be said of Islamic insurance, or *takāful*, which, like Islamic banking, started on a limited scale but has gathered strength in just over a decade, so much so that it now commands a significant presence in the insurance sector of Malaysia.

When one speaks of Islamic law in Malaysia, one is basically concerned with Islamic family law as this is the main area where the Sharī'a is applied. The application of Sharī'a is governed by the State Enactments, which are introduced by the state legislature with the approval of the Sultan, and every state has its own jurisdiction in the matter. The application of Sharī'a is consequently not uniform in the country as a whole. This has been a cause for concern and Malaysian leaders and experts in recent years have spoken of disparity in the law and practice of Sharī'a among the various states. There are also issues in matrimonial law that warrant attention.

One of the growing concerns of Malaysian administrators and Muslim leaders in the post-war period has been a marked marital instability among Malay Muslims that was characterised by high rates of divorce and polygamy, especially in Kelantan and Kedah in the north and Melaka and Johor in the south. Numerous explanations were given: disparities between state legal and administrative systems, wide-ranging socio-economic differentials of the Malay Muslims encompassing bilateral and matrilineal systems of kinship, and disparities among poorly educated fishermen and farmers on the one hand to urban professionals and business executives on the other.

The reformist elite and women groups saw the problems over the high rates of polygamy and divorce as a consequence mainly of the ways in which the Sharī'a provisions were understood and applied in Malaysia, but it proved extremely

difficult to address them. It was in adjacent Singapore, which has a substantial Muslim minority population but no entrenched Islamic establishment that a Muslim Ordinance was passed in 1957 (amended in 1960) stipulating that only divorces by mutual consent may be registered by a *Qāḍī*, that only the Chief *Qāḍī* may solemnise a polygamous union, and that a consolatory gift, or *mut'ah*, may be payable by a divorcing husband. The Ordinance also provided for the creation of a Syariah Court which would exercise jurisdiction in matrimonial disputes among Muslims. The contagion effects of these measures were considerable.

In peninsular Malaysia separate state administrations and the subordination of the Syariah Court to Civil Courts hampered the prospects of substantive reforms, and it was not until the rise to prominence of the Muslim revivalist and *da'wah* movements in the 1970s and early 1980s that circumstances became more favourable for marriage law reforms.

Family law reforms in Malaysia were introduced within the general framework of *siyāsah shar'īyyah*, or Sharī'a-oriented policy, that encouraged adoption of judicious measures which secured benefit for the people and were not contrary to the Sharī'a. Salient among these were statutory restrictions on polygamy and divorce with the expressed purpose to ensure the Qur'ānic requirements of justice therein. The Islamic Family Law (IFL) (Federal Territories) Act 1984, was a landmark legislation which addressed, in about 135 sections, issues pertaining to the administration of Islamic law on registration and solemnisation of marriage, guardianship, maintenance, custody, and dissolution of marriage. The two most significant reforms that were introduced related to polygamy and divorce. In a series of substantially similar enactments passed between 1984 and 1990, most of the other states in Malaysia adopted the

provisions of the IFL 1984 with a measure of enthusiasm that was, however, short-lived. Within a decade, the religious leaders challenged the modernist interpretations of the Sharī'a as being too radical and in disharmony with the traditional Sharī'a. Some of these reforms were consequently revoked and amendments were introduced by many states that are indicative of a conservative come-back in the administration of Sharī'a in Malaysia.

Since the second half of the 1980s and throughout the 1990s the religious authorities and departments in several states allowed the practice of polygamy and ignored the restrictions that were in force under the existing enactments. A clear manifestation of this conservative reaction was the Islamic Family Law (Federal Territories) (Amendment) Act 1994 which effectively overruled some of the earlier reforms. This study elaborates on these developments and the concerns that they have caused over the status of Islamic law in Malaysia.

In the areas of education and learning of Sharī'a-based disciplines, Malaysia has retained its traditional *madrassa* teaching institutions and some have been upgraded in recent years. There are some well-known Islamic schools and *madrassas* in the various states of Malaysia, and the one in Kelantan is now affiliated with the Azhar University of Egypt. The International Islamic University Malaysia has been operating since 1983 and has consistently expanded over the years. These institutions provide courses in Arabic and Sharī'a-based disciplines related to the training of prospective *qādis*, jurisconsults, *muftis* and teachers. As of 1997 the Ministry of Education has also made the teaching of Islamic civilisation a compulsory subject throughout the national education system in the country. These developments are indicative, not only of continuity of some of the features of Islam, but also of the need to provide the otherwise secularist educational curricula

in the national schools with a cultural anchor, and Islam comes as a principal candidate of playing that role. There are also numerous international, Chinese and Indian schools in Malaysia, which offer programmes in their respective languages and culture and many are prominent, successful and competitive with the national school system.

Some development has also taken place in the sphere of Islamic criminal law since the introduction of the Syariah Criminal Code II 1993, commonly known as the Hudud Bill, in the state of Kelantan. This came in the wake of the PAS election victory in the 1990 general election. This experiment has, however, remained controversial and the Hudud Bill, although passed by the State Legislative Assembly of Kelantan, has been opposed by the Federal Government, for reasons that I shall later have occasion to explain. The Hudud Bill episode has also brought into sharp relief the mixed vision and sentiments of the Malay leaders over what clearly marked a return, on a somewhat dogmatic basis, to the scholastic formulations of the Sharī'a in this area. The Federal Government has refused to be swayed by the puritanical PAS and here we see a division of the paths to the Sharī'a. The Sharī'a that is now debated in Malaysia is evidently not a monolithic proposition, as what we have seen is a supportive attitude for only some parts of the Sharī'a but reservations toward the implementation of certain other parts. The parts of the Sharī'a that are relatively non-controversial, such as the Sharī'a law of commerce *mu'āmalāt*, tend to invoke a supportive response, but the more controversial aspects of Sharī'a, including the *ḥudūd* punishments, do not seem to receive an equally affirmative backing.

CHAPTER TWO

A Historical Sketch

This chapter is presented in two sections, the first of which provides an overview of the history of Islam and its Shar'i'a in Malaysia. This is followed by a similarly brief account of the arrival of English law and its continued influence on the Malaysian legal system.

1. Arrival of Islam in the Malay Archipelago

Malaysia's experience of Islam is somewhat different from most of the Muslim countries in other regions. Whereas the present-day Muslim countries of Middle East and Asia witnessed the spread of Islam in the eight and ninth centuries, Islam did not reach Malaya until the fourteenth century and only found a foothold in Melaka in the fifteenth century. Historical records also suggest that Islam came to this region from different sources, which included India and China; in addition to Arabia, and traders and missionaries, rather than soldiers, have played a more prominent role in the arrival of Islam. There were on the whole few instances of military conquest, which has meant that the spread of Islam in the Malay archipelago has been gradual and had no definite beginning.

While the patronage of the royal court of Melaka and other Sultanates in the region was an important factor in the spread of the religion, the Sufi saints have also helped in conversion of the local population to Islam. Arab and Indian missionaries who were mostly Sufis concerned themselves mainly with the ritual and spiritual aspects of religion and less so with legal and political matters. This aspect of Islam has remained strong in this region ever since. The *ṭarīqahs* (Sufi Orders) that they propagated among the Malays were typically unitarian (*tawhīdī*), undivided by scholastic (*madhhabī*) separations, and emphasised the universal spirit of Islam.¹⁶ The message of unity in Sufi teachings went so far as to even transcend the religious divides. Thus according to al-Attas :

The Sufi preaching of the self-same Universal spirit that accounted for the identical expressions found in the doctrines of different religions has made it possible for the plural societies that have existed in Malaya to live side by side peaceably and with a spirit of tolerance that is evident even to this day.¹⁷

The unitarian leanings of Sufi teaching are contrasted, however, by the ethnicity and customs of this region. The ethnic complexity of Southeast Asia and the prevalence of strong local customs present a unique picture of Islam. Southeast Asian Islam is influenced by ethnic heterogeneity and variation in the teaching of some of the precepts and doctrines of the religion so much so that one could speak of Javanese Islam, Achenese Islam, Malay Islam and so on.¹⁸ Before the arrival of Islam, the

16 Cf. Muzaffar, "Tolerance in the Malaysian Political Scene", in Alhabshi and Nik Hassan, eds, *Islam and Tolerance*, p. 134.

17 Al-Attas, *Some Aspects of Sufism*, pp. 99-100.

18 Cf. Ahmad Ibrahim, Sharon Siddique and Yasmin Hussain, *Readings on Islam in Southeast Asia*, p. 3.

Malays followed customary and tribal laws, which were influenced by Hinduism. After the Malay Rulers and their subjects embraced Islam, attempts were made to adopt Islamic law and harmonise the Malay customary law to the teachings of Islam. Instances of such adaptation can be seen in the laws of Melaka – the *Undang-Undang Melaka*, and those of Pahang, Johor and Terengganu, which became less customary and more Islamic over time.¹⁹

The Sultans in each of their respective states were the heads not only of the religion of Islam but also political leaders in their states, “which were Islamic in the true sense of the word, because not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law”.²⁰ The law that was applied in peninsular Malaysia was the Islamic law which had absorbed certain elements of the Malay customary law. In some parts of Malaysia as in Negeri Sembilan, Melaka, and in the Borneo states, the influence of Malay custom was stronger. Islamic law was administered by the *Qāḍi* with an appeal to the Ruler. From the early years of the colonial era, the Malay states in the peninsula had by statute empowered the *Qāḍi* courts to exercise jurisdiction over matters of Muslim matrimonial and other personal laws. Though there existed a broad outline of uniformity among the states, they reflected nevertheless the religious authority of the state Rulers and displayed certain differences that were jealously guarded.

Before 1880, the law applicable to Muslims was generally the judicial precedents of India that were based on the British experience of Muslims in India. Indian precedents were thus

19 See for details Ahmad Ibrahim, *The Malaysian Legal System*, p. 53.

20 Ahmad Ibrahim, “The Introduction of Islamic Values in the Malaysian Legal System”, *IKIM Journal*, Vol. 2, no. 1 (1994), pp. 35-36.

commonly cited in reaching decisions in matters of Muslim family law. Thus in the case of *Salmah and Fatimah v. Soolong* [1887] 1 Ky 421, reference was made to the standard Anglo-Muhammadian texts to reach a decision on the validity of a marriage between an Arab Shāfi'i woman and an Indian Hanafi man; The court also referred to the Bombay case of *Muhammad Ibrahim v. Ghulam Ahmad* [1864] Bom. HCR 236. In the early years of twentieth century, the Ottoman *Mejelle* was translated and adopted in Johore as *Majallah Ahkam Johor* and the Malay states and rulers resorted to Islamic law more widely than the non-Malay states of Penang, Sabah and Sarawak. This process was in progress when the British came and exercised their influence in the Malay states. According to R.J. Wilkinson "there can be no doubt the Muslim law would have ended by becoming the law of Malaya had not the British law stepped in to check it".²¹

Notwithstanding the myriad of influences that have given Islam in the Malay archipelago universalist and tolerant leanings, the facts of history show clearly, nevertheless, that present-day Malaysia is basically a Malay-Muslim polity. The Kingdom of Melaka with Malay as its language and Islam as its religion marked the genesis of this polity which has remained with us ever since. It was through Melaka that Islam spread along the littoral regions as far as the Sulu Archipelago in the Philippines and provided the Malay Muslims with a sense of belonging to a wider Muslim community. The expansion probably took place after Sultan Muzaffar Shah's declaration, around 1450, of Islam as the official religion of the kingdom. Melaka became a centre for the study and propagation of Islam and converted the neighbouring Malay states of Kedah,

21 R.J. Wilkinson, "Papers on Malay Subjects", Kuala Lumpur, 1971, also quoted in Ahmad Ibrahim, *The Malaysian Legal System*, p. 54.

Terengganu and Kelantan which were under Siamese suzerainty and together with Johor became fiefs of the Sultan of Melaka. Islamic law was increasingly applied in the administration of justice but pre-existing laws were also retained. The Laws of Melaka (*Hukum Kanun Melaka*) which were compiled during the reign of Muzaffar Shah (1446-1459) were influenced from three sources: the early non-indigenous Hindu/Buddhist tradition, *Adat*, and Islam.²² Though the Melaka Kingdom came to an end in 1511 when conquered by the Portuguese, its successor states retained the defining features of Malay-Muslim polities, not only in respect of language and religion but with regard also to culture, politics and administration. British colonialism acknowledged these sultanates as Malay-Muslim polities and concluded treaties with them on that basis.²³

The demographic transformation that colonialism brought did not change the nature of these polities. For the Chinese and Indian immigrants of the early decades of the twentieth century were basically economic enclaves created by colonial rule. Neither the colonial administration nor the Malay Rulers regarded them as citizens. The situation began to change after World War II when large numbers of first generation Chinese and Indian immigrants were conferred citizenship rights on a liberal basis. Their children were bestowed automatic citizenship. Their incorporation into the Malayan and later Malaysian state transformed the very character of the polity. It was no longer an exclusive Malay polity. Malaysia had been transformed into a multi-ethnic, multi-cultural and multi-religious society.²⁴

22 See for details, M.A. Wu, *The Malaysian Legal System*, p. 4 ff.

23 See for details Chandra Muzaffar, "Tolerance in the Malaysian Political Scene", p. 122 ff; Andrew Harding, "Islamic Law in Malaysia", p. 62.

24 *Id.*, p. 123.

Under the first Prime Minister of Malaysia, Tunku Abdul Rahman (1957-70), the government had practiced a policy of accommodation to the extent of downplaying the role of Islam, except during election periods when it was in competition with PAS. Considerable tension had consequently developed within UMNO as many members of parliament and local party leaders felt that the government was not sufficiently attentive to Malay-Muslim needs.²⁵

In the 1970s there was an obvious increase in support for Islamic causes that constituted the discourse of Islamic revivalism. While still attempting to maintain the politics of accommodation, the government gave more financial assistance to Islamic religious activities and *dakwah* groups, developed contacts with international Islamic activities, and made Islam more visible on radio and television. Some of the new factors that reinforced this trend was the 1973 OPEC oil embargo which led to increased cooperation among Muslims in the Middle East and beyond. This was accompanied by the large-scale movement of rural Malay youth to secondary schools and universities, which gave them a greater awareness of their ethnic and religious identities. And, finally, events in Iran and Pakistan helped to increase Islamic self-awareness in Malaysia, which found expression in the demands for greater adherence to Islamic law. Some religious and political leaders, including the then head of PAS, demanded a constitutional amendment to prohibit acts of government, policies and programmes, that were contrary to Islamic principles.²⁶ UMNO, in the meantime, attempted to establish itself as the chief supporter of Islam in Malaysia, as "a moderate middle-

25 Von der Mehden, "Islamic Resurgence in Malaysia", p. 167.

26 *Id.*, p. 172.

ground group between Islamic extremism on one hand and 'left-wing materialism' on the other".²⁷

Malaysia's moderate stance on Islam tends to be in line with the general pattern of the Islamic history of this country. While acknowledging that the late arrival of Islam to Southeast Asia has meant its relative marginalisation from the intellectual tradition of Islam, Anwar Ibrahim has also noted that "this lack of historic greatness is a boon".²⁸ The Arabs, Turks and Persians are weighed down by their historical greatness whereas "the Malays are less haunted by the ghost of the past, more attentive to present realities, and have greater awareness of their many shades and nuances".²⁹ Anwar Ibrahim then added that "the culture of tolerance is the hallmark of Southeast Asian Islam".³⁰ This culture of tolerance has found staunch support in the views of women activist groups, including Sisters in Islam, who stated on one occasion that "we have built in our society a culture of tolerance ... In no other country which calls itself Muslim do women enjoy the same freedom of movement, association and education as in Malaysia".³¹ One can add to this perhaps the relative openness of the Malaysian press and Malaysian leaders over religious and Sharī'a-related issues and I shall have occasion to discuss some of them in the following pages.

27 *Id.*, pp. 176-177.

28 Some of the prominent intellectuals of the Malay world such as Hamzah Fansuri and Nuruddin al-Raniri appeared as late as the 17th century and "none ... could be ranked with the great scholars and interpreters of Islam from the Arabs and Persians". See Anwar Ibrahim, *The Asian Renaissance*, p. 123.

29 *Ibid.*, p. 122.

30 *Ibid.*, p. 123.

31 See Sisters in Islam's letter to the Prime Minister in Rose Ismail, ed., *Hudud in Malaysia*, p. 9.

2. Introduction of English Law

The Portuguese ruled Melaka from 1511 to 1614 and the Dutch from 1641 to 1795. The British occupied Melaka in 1795 but returned it to the Dutch in 1801. The British then reoccupied Melaka from 1807 to 1818 and eventually ceded it from the Dutch under the Anglo-Dutch Treaty in 1824.

Portuguese and Dutch laws had no significant impact on the Malay states, but the British took steps to enact several laws and charters to make English law applicable in Malaya. These attempts were piecemeal, made separately in different states, through a series of treaties that were signed with the Sultans, beginning with the Treaty of Pangkor and through the so-called British advice and a system of indirect rule. Under the treaties, the Malay Ruler was in theory obliged to receive, and act on, the advice of the Resident, except in relation to matters pertaining to Islam and Malay custom.³² As a result of these developments, two separate features of the Shari'a, namely the public aspect and the private aspect, were separated from one another. The public aspect of Islamic law was overtaken and dominated by English law. Islamic law was isolated and eventually confined to matrimonial law, divorce and inheritance only. English law was introduced by legislation to replace the Islamic law, and civil courts were established to take over the functions of the *Qādi* courts. These latter were relegated to the bottom of the hierarchy of courts and their powers were curtailed.

In the Straits Settlements (i.e. Penang, Melaka and Singapore), English law became the general law of the land by

32 Cf. Abdullah Alwi Haji Hassan, *The Administration of Islamic Law in Kelantan*, pp. xvii-ii; Ahmad Ibrahim, "The Introduction of Islamic Values in the Malaysian Legal System", *IKIM Journal*, Vol. 2, no. 1 (1994), p. 36; Andrew Harding, "Islamic Law in Malaysia", p. 62.

virtue of the Charters of Justice 1807, 1826 and 1855. The Charters set up a judicial system and made English law applicable to the native inhabitants and other residents in so far as their various religions and customs would permit.³³ English law was thus followed in all civil, criminal and ecclesiastical matters. A Court of Judicature was also established to exercise the jurisdiction of the English Court of Chancery. English law consequently abrogated all the existing laws in the Straits Settlements. As per Terrell J. in *Daing v. Mongkah* [1935] MLJ 147:

It must be remembered that by virtue of the various Charters, the English Common Law regulates the rights of all persons in the Straits Settlements whatever their religions, so far as circumstances will admit. There is no provision in the Straits Settlements Charters as there is in some of the Indian Charters, that Muhammadan Law shall be administered for Muhammadans and Hindu Law for Hindus. Nor is the position the same as it is in the federated Malay states where by virtue of the religion of the parties Muhammadan law would be applicable.

The Civil Law Ordinance 1878 proclaimed the reception of English law in the Straits Settlements especially in the sphere of commercial law, and this was later adopted in toto by the Revised Edition of Civil Law Ordinance 1936. This position remained unchanged until the Straits Settlements were altogether disbanded in 1946.

Unlike the Straits Settlements which were a colony, the Malay states were ruled by the respective Sultans whose independence was recognised in a number of cases where the

33 Cf. Hooker, *Islam in Southeast Asia*, p. 170.

court upheld the independence of the Malay states. Although no Charter of Justice was introduced in the Malay states, English law was nevertheless introduced in these states through the Residential system whereby the British Resident advised the respective Sultan in the matter of administration of justice. The State Council which included the British Resident discussed and passed all laws on a variety of subjects concerning even Muslim personal law, such as registration of marriage and divorce, offences against religion, *zakat* collection, appointment, salaries and dismissal of *Qādis*. The State Council, although a secular forum, was assigned the task to rule on religious matters, whereas non-religious matters were governed by the British administration. This division of tasks also introduced the dichotomy between private or personal law, where Islamic law applied, and public law, which became the province exclusively of English law.

The dichotomy between the two spheres of law, namely personal and public, was then ratified and developed by case law. Thus in the case of *Ong Chang Neo v. Yap Kwan Seng*,³⁴ it was stated that "... the entire Muhammadan law is a personal law founded in religion, it gives rights only to those who acknowledge Islamism." This was subsequently reiterated in *Shaik Abdul Latif v. Shaik Elias Bux*,³⁵ where the court held that "Muhammadan law was a personal religious law." Even though there was no formal reception of English law in the Malay states until 1937, English law and principles were already in operation and had substantially replaced Islamic law and *Adat*.

English commercial laws on partnership, banking, mercantile law and insurance were introduced under the Civil

34 [1897] 1 SSLR (Straits Settlements Law Report) Supp. 1.

35 [1915] 1 FMSLR 204.

Law Ordinance of the Straits Settlement in 1878, and the Civil Law Enactment 1937 authorised the courts to introduce English Common Law and The Rules of Equity even in fields not covered by legislation. The laws that were so introduced followed, as noted above, the model of the legal codes in India. Thus were introduced the Penal Code, the Evidence Ordinance, the Contract Ordinance, the Criminal Procedure Code and the Civil Procedure Code. The Torrens System of land registration was also introduced to replace the former Malay-Muslim land law.³⁶

These various enactments were then incorporated in the Civil Law Act 1956 (revised 1972) which was extended to the whole of the Federation of Malaya including Sabah and Sarawak. Section (3.1) of this Act provides that English Common Law and rules of equity be applied in peninsular Malaysia, Sabah and Sarawak "in so far as local circumstances and conditions permit". Notwithstanding this, Islamic law has over the years been replaced in the fields of criminal law, contract, evidence and procedure, and land law. Today English law has become the general law of Malaysia. Other laws such as Chinese, Indian, Malay customary law and Islamic law are confined to the domain only of personal law.³⁷ Writing in 1993 Professor Ahmad Ibrahim commented that the flexible terms of section (3) of the Civil Law Act 1956 could have been applied so as to modify the English law in cases where all the parties were Muslim and to apply the Muslim law to them. This has not, however, been done. On the contrary what one finds is that the civil courts have applied the statutory law to Muslims even where its application would lead to a conflict

36 Ahmad Ibrahim as in note 32, p. 29.

37 See for details Abdullah Alwi Haji Hassan, *The Administration of Islamic Law in Kelantan*, pp. xlvii-lii.

with the Muslim law, as for example, in cases of breach of promise of marriage, legitimacy of children, and custody of infants where the civil courts have applied the provisions respectively of the Contract Act 1958, The Evidence Act 1956 and the Guardianship of Infants Act 1961.³⁸

Until 1948 the Court of *Qādis* and Assistant *Qādis* in the Malay states were part of the structure of the civil courts. But the Courts Ordinance 1948 established a judicial system for the Federation wherein the Syariah Courts were omitted from being part of the Federal court system. The judicial power of the Federation was vested in the Federal Court, the two High Courts in Malaya and Borneo, and the inferior courts comprising of Session Courts, Magistrate Courts and Penghulu Courts. The Federal courts were in turn presided by a British judge or judges trained in English Common Law and they applied the English law whenever there was no legislation that could be applied.³⁹ The subordinate status of the Syariah Courts subsequently remained unchanged even after Malaysia achieved independence. The Federal constitution 1957 vested judicial powers only in the Federal Court (later known as Supreme Court), the High Court and lower courts that were established under Federal law, once again, without any reference to the Syariah Courts (Art. 121). This article was amended in 1988. The subject matter of that amendment and its aftermath will be separately discussed in the next section on constitutional references to Islam and the Syariah Courts. In a similar vein, the definition of law in the Constitution did not specifically mention Islamic law. Article 160(2)(b) of the Constitution thus provided : "Law includes written law, the

38 See for details Ahmad Ibrahim, "The Introduction of Islamic Values in the Malaysian Legal System", *IKIM Journal*, at p. 33.

39 Cf. Ahmad Ibrahim, *The Malaysian Legal System*, p. 55.

Common Law in so far as it is applied in the Federation or any part thereof, or any custom or usage having the force of law in the Federation or any part thereof." As I shall presently elaborate, only in 1988 under an amendment to its Art (121) the Federal Constitution recognised the Syariah Courts as a separate jurisdiction to act side by side with the civil courts.

CHAPTER THREE

Constitutional References to Islam

Article (3) of the Federal constitution 1957 provides that "Islam shall be the religion of the Federation, but other religions may be practiced in peace and harmony in any part of the Federation". Article (11) provides that every person has the right to profess and practice his religion and, subject to clause (4), to propagate it. Clause (4) draws a distinction between state law and federal law and then provides that state law (and in respect of Federal Territory and Labuan, Federal law) may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Furthermore, every religious group has the right to manage its own affairs, to establish and maintain institutions for charitable purposes and also to own and acquire property in accordance with law. Islamic religious matters including the application or otherwise of Sharī'a to individuals thus fall under the jurisdiction generally of the state law. In almost every state, the Sultan is the official head of religion and the power to legislate on Sharī'a-related matters lies with the State Legislature.

Although it was not intended that Malaya should become

an Islamic state, the constitutional recognition of Islam as the state religion in combination with the strong undercurrent of communal politics in the post-independence era generated controversy over the practical consequences that should or should not be implicit in such a provision. "There has been a continuing agitation", as Ratnam explained "from some sections of the Malay community that the purely symbolic value attached to the constitutional provision that elevates Islam to its national status is not satisfactory".⁴⁰ Leaders of the pan-Malayan Islamic party, for example, asserted that article (3) of the constitution has turned out to be "nothing but a dishonest political maneuver by the Alliance", and that if their own party came to power, they would see to it that "genuine Islamic principles of administration" were adopted and enforced.⁴¹

Although Islam is the religion of the Federation, there is no head of the Muslim religion for the whole of the Federation. The King (Yang di-Pertuan Agong) continues to be the Head of Islam in his own state, and under the constitution also the Head of Islam in the Federal Territory, Melaka, Penang, Sabah and Sarawak as these states have no Malay Rulers of their own. The King's representatives in these states, known as Yang di-Pertuan Negeri, are effectively the patrons of Islam. The remaining nine states of Malaysia have each their own Ruler, or Sultan, as the Head of Islam in that state. The Conference of Rulers have agreed, however, that in respect of ceremonies and observances that cover the whole of the Federation, the King is authorised to represent each and everyone of the Rulers as the Heads of religion in their

40 Ratnam, "Religion and Politics in Malaya", in Ahmad Ibrahim et al, ed. *Readings on Islam in Southeast Asia*, p. 144.

41 Id.

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40 Ratnam, "Religion and Politics in Malaya", in Ahmad Ibrahim et al, ed. *Readings on Islam in Southeast Asia*, p. 144.

41 Id.

states.⁴² The various state constitutions provide that the Ruler may act in his discretion in the performance of any functions as the patron of Islam, but it appears that the YDPA may only act on advice in performing his functions as the patron of religion in Melaka, Penang, the Federal Territory, Sabah and Sarawak.

Malaysian leaders and judges have generally maintained that Malaysia is a secular state and references to Islam in the constitution are basically confined to ceremonial matters - such as recitation of Islamic prayers (*du'ā*) at the opening and closing of official government functions, installation or birthday of the King, Independence Day and similar occasions. A participant of the constitutional debate and the first Prime Minister of Malaysia, Tunku Abdul Rahman, thus commented that "I would like to make it clear that this country is not an Islamic state as it is generally understood, we merely provided that Islam shall be the official religion of the state".⁴³ This was stated in response to a Muslim member of the Legislative Council who introduced the motion that "this Council is of opinion that the serving of alcoholic drinks at all functions of the Federal Government ought to be prohibited". In the event the following amended resolution was adopted: "This Council is of opinion that the serving of alcoholic drinks to Muslims at all official functions of the Federal Government ought to be prohibited".⁴⁴

A Legislative Council Member, Datuk Haji Yahya, expressed a different view concerning the constitutional status of the state religion:

42 Art. 3(2), Federal constitution.

43 Official Report of Legislative Council Debates, 1st May 1958, Columns 4631 and 4671, also quoted in Ahmad Ibrahim, "The Position of Islam in the Constitution of Malaysia", in ed. Ahmad Ibrahim et al, *Readings on Islam in Southeast Asia*, p. 217.

44 Id.

It is pointless for the independent Federation Government to recognise itself as an Islamic Government and the teaching of Islam and the laws of Shari'a are neglected ... The state must therefore respect the rules of Islam and Islamic laws, as far as possible.⁴⁵

When preparations for independence were underway in the early 1950s, it was not yet decided whether the non-Malay inhabitants of the peninsula would be granted citizenship. Both UMNO and MCA opted for an early termination of British colonial rule and were able to strike a 'bargain'. The Chinese agreed to support a special constitutional provision for the Malays and that Bahasa Melayu should become the official language after a period of transition, replacing English. The Malays accepted on their part that non-Malays born in the country after independence should automatically become Malaysian citizens, while non-Malays above the age of eighteen could obtain citizenship after five years of residence.⁴⁶

The 'bargain' so reached also included the Chinese acceptance of Islam as the state religion, on condition, however, that followers of other religions were granted freedom of belief, practice and propagation. The latter point was agreed to by the Malays as long as the propagation of other religious doctrines was not targeted at them. The Malays agreed to accommodate the large numbers of non-Muslims in their midst, however, not at the risk of losing their identity. The non-Malays showed willingness in return to allow the Malays 'special status' treatment in matters of language, culture and the position of their Sultans.⁴⁷

45 Id.

46 Schumann, "Christians and Muslims," p. 244.

47 Mutalib, *Islam and Ethnicity*, p. 28.

Although UMNO included Islam as one of its primary objectives, when independence was won on August 31, 1957, Islam was not granted a prominent role in the governance of the state. The first Malay Chief Justice after independence, Mohamed Suffian Hashim, in 1962 interpreted the scope of Islam in the constitution as being primarily for ceremonial purposes. Then again in 1979, in his capacity as Lord President, Suffian spoke in favour of the secular orientation of the Malaysian government when he said that "politics and religion cannot be combined together, and the implementation of Islamic law in criminal and civil affairs (not including personal law) to all people in the country is not suitable because Malaysia is a multi-racial state".⁴⁸ In a comment on Article (3) of the constitution Sheridan and Grove similarly noted: It does not seem that the clause "Islam is the religion of the Federation" has any legal effect. These words possibly impose an obligation on the participants in any federal ceremony to regulate any religious parts of the ceremony according to Muslim rites. Beyond that, it is difficult to see "how a federation, as opposed to the people living in it, can have any religion".⁴⁹ Another commentator has noted that the logic of Islam as the religion of the Federation under a constitutional system in which Islam is a state matter can only be maintained if the prescription is intended in a purely ceremonial sense. Article (3) is thus explained by saying that while Islam is the religion of the Federation, Malaysia is not thereby an Islamic state.⁵⁰

48 Muhammad Suffian, "Parliamentary System versus Presidential System: The Malaysian Experience", [1979] 2 MLJ iv.

49 L.A. Sheridan and Hary E. Grove, *The Constitution of Malaysia*, 27-28.

50 Andrew Harding, "Islamic Law in Malaysia", note 1 at p. 63.

The matter was tested in the case of *Che Omar v. Public Prosecutor*,⁵¹ in which it was argued that the enactment of a mandatory death penalty for drug trafficking was contrary to Islam. The Supreme Court, referring to the history of Islam in Malaysia, rejected this argument, holding that Article (3) was not a clog or fetter on the legislative power. In doing so, the court drew a distinction between private law, where Islamic law applied, and public law, where it did not, adding that Islamic law was historically confined to private or personal law in Malaysia. Salleh Abas L.P., held that Article (3) was never intended to extend the application of Sharī'a to the sphere of public law, and he added:

If it had been otherwise, there would have been another provision in the constitution which would have the effect that any law contrary to the injunctions of Islam would be void.

Abdul Hamid L.P., also wrote in his 1990 judgment in the renowned case of *Teoh Eng Huat v. Kadhi Pasir Mas*⁵² that the constitutional drafting commission, known as the Reid Commission, submitted in reference to the wording of the proposed Article (3) of the Constitution on the state religion :

We have considered the question whether there should be any statement in the constitution to the effect that Islam should be the state religion. There was universal agreement that if any such provision were inserted, it must be made clear that it would not in any way affect the civil rights of non-Muslims ... and shall not imply that the state is not a secular state.

51 [1988] 2 MLJ 55.

52 [1990] 2 MLJ 300.

Article (3) of the federal constitution does have the effect, nevertheless, of enabling the state and federal governments to maintain and establish Islamic institutions and also to provide instruction in the religion of Islam that may incur expenditures. Moreover, Article (3) and its special treatment of the religion of Islam can be linked to Article (153) which gives special rights to the Malays. These provisions enable the government to promote Islam-related activities and also socio-economic development programmes for the benefit of Malays provided that these are not discriminatory of other religions.⁵³

Initially most of the state constitutions contained provisions to the effect that only a Muslim of the Malay race could be appointed as a Chief Minister. After Independence, these provisions were amended to enable a Ruler to appoint a non-Muslim Chief Minister who commanded the confidence of the majority of the State Legislative Assembly. The constitutions of the Malay states still provide that the State Secretary shall be a Muslim of the Malay race. However, there is nothing in the federal constitution to require the Prime Minister or any Minister or federal official to be Muslim.⁵⁴

The federal constitution (Art. 4) declared that "This constitution is the Supreme Law of the federation and any law passed after Merdeka Day which is inconsistent with this constitution shall to the extent of the inconsistency be void." Elsewhere it is provided that "if any state law is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void" (Art. 75).

53 Cf. Saleh Abas, "Traditional Elements of the Malaysian Constitution," p. 8.

54 Cf. Ahmad Ibrahim, "The Position of Islam in the Constitution of Malaysia," in M.S. Hashim and Trindade, *The Constitution of Malaysia*, p. 51.

Islamic law in Malaysia is therefore subject to the supremacy of the constitution and a possible conflict between any provision of the Sharī'a and those of the constitution or of the federal law will be determined in favour of the latter two.

A certain argument arose that since Article (3) recognised Islam as the religion of the federation, any law which is passed contrary to the Sharī'a would therefore be void. Sheridan has refuted this argument and suggested that this could only be the case if there were a separate :

provision in the constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such a provision, Article (162) on the other hand purposely preserves the continuity of secular law prior to the constitution, unless such law is contrary to the latter.⁵⁵

Professor Ahmad Ibrahim also wrote that "all laws in conflict with federal laws are automatically null and void."⁵⁶ It thus appears that the prevailing climate of opinion in the judiciary and elsewhere in the higher echelons of Government has not shown any decisive shift of policy to alter the original perception of the secular state as was expressed in the constitutional debate some fifty years ago.

Islamic affairs in every state are regulated under the Administration of Muslim Law Enactments or ordinances.

55 Sheridan, "The Religion of the Federation," [1988] 2 MLJ xiii. Article 162(d) provides: "subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under the constitution, continue in force, on and after *Merdeka Day*, with such modifications as may be made therein under this Article and subject to any amendments made by Federal or State law."

56 Quoted by Mutalib, *Islam in Malaysia*, p. 118. Mutalib has translated Prof. Ahmad Ibrahim's 1976 Seminar paper entitled "Kedudukan Islam dalam Masyarakat Melayu."

These Enactments are similar in content in almost all states. Selangor was the first state to pass the Muslim Law Enactment in 1952 and this was subsequently followed by other states. Each state has a Council of Islamic Religion and Malay Custom (Majlis Agama Islam dan *Adat Istiadat Melayu*) which is headed by a *Mufti* and has powers to issue *fatwa*. Furthermore, a Department of Religious Affairs, headed by the Yang di-Pertua Ugama, is responsible for the affairs of Syariah Courts, Sharī'a legal profession, judicial appointments and the general enforcement of Islamic law. There are two types of Syariah courts, namely Courts of Kadhi Besar and Courts of Kadhi. Appeals lie to the Ruler-in-Council, who may appoint a Legal Committee, to hear appeals. The Ruler in each state appoints the Kadhi Besar, Kadhi, and the Majlis members. The Majlis is the next highest authority in the state after the Ruler and advises the latter on all matters of state religion and Malay custom. The Syariah Courts have limited jurisdiction and operate side by side with the national courts, which are courts of general jurisdiction.⁵⁷

Legislative power under the constitution is divided into federal and state. The federal legislative powers extend to matters that are enumerated in the Federal List (i.e. the First and the Third List set out in the Ninth Schedule) and this precludes Islamic law, which has been placed under the State List. Hence the Federal parliament cannot make law dealing with Islamic law (except for Federal Territories of Kuala Lumpur and Labuan). The Supreme Court has consequently found it possible to strike down a federal law that was designed to curb religious radicalism on the ground that it could only be

57 Cf. Ahmad Ibrahim, *The Malaysian Legal System*, pp. 60-61; Tham Seong Chee, *Malays and Modernisation*, p. 221.

enacted by the states.⁵⁸ The State Legislatures can legislate and the laws passed by them cannot be declared void even if they contravene the Shari'a,⁵⁹ as there is no equivalent in the Malaysian constitution to what is known as "repugnancy clause" in the constitutions of other Muslim countries. This is also a corollary of the fact that the definition of law in the constitution does not mention Islamic law. Since the administration of Islamic law under the constitution is a responsibility generally of the State Legislature, the latter's hands are virtually free to legislate on matters that are specified in the State List.

Islamic law in Malaysia applies to its Muslim citizens only and it is basically confined to matters as are specified in the State List of the federal constitution. The State List specifies matrimonial law, charitable endowments (*awqāf*), bequests, inheritance, and offences that are not governed by federal law such as matrimonial offences, *khalwat* (intimate proximity between a male Muslim and a woman, whether Muslim or non-Muslim, to whom he is not married) and offences against religion. These are to be regulated by the state enactments and the power to legislate on these matters is vested in the state legislature and the Sultan. The Federal Parliament can only legislate on matters dealing with Islamic law and religion for the Federal Territories of Kuala Lumpur and Labuan, and has no power to legislate for the rest of Malaysia. Article (76) of the federal constitution thus stipulated that Parliament can legislate on matters pertaining to the State List in order only to realise "uniformity of law and policy", and in matters of Islamic

58 Idem, "The Future of the Shari'a and the Syariah Courts in Malaysia", *Journal of Malaysian and Comparative Law*, Vol. 20 (1993), p. 41.

59 *Mamat bin Daud v. Public Prosecutor*, [1988] 1 MLJ 119, (1988) LRC (Const.) 46.

law and the Malay custom "if so requested by the Legislative Assembly of any state". Even when Parliament makes law at the request of the State Legislative Assembly on personal law matters, such law "shall not come into operation in any state until it has been adopted by a law made by the legislature of that state". Such law is then deemed to be a state law and not a federal law, and "may accordingly be amended or repealed by a law made by that legislature".⁶⁰ It is thus clear that even when Parliament passes a law on Shari'a-related matters, the State Legislature has powers to amend or repeal it as it deems fit. This may be said to be a recipe for disparity and divergence as it is now seen in the application of Islamic law in Malaysia, so much as to prompt observers to note that "there are various family laws practised in Malaysia",⁶¹ and that "Malaysia is the only country in the Muslim world where each state has independent jurisdiction over religion leading to inconsistencies and contradictions in the provisions of law, in interpretation and in implementation, state by state".⁶² In response to the question as to "why should Malaysia, a relatively small country, have 14 different religious authorities," another observer noted that religion provided the "basis for our Monarchy's legitimacy," that religion was "among the few things left," and that the Malay Rulers had otherwise surrendered the power to rule either to federal or state authorities.⁶³

60 Federal constitution, Article 76(3).

61 Hamid Jusoh, *The Position of Islamic Law in the Malaysian Constitution*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1993, p. 63.

62 Sisters in Islam, letter to the Prime Minister Datuk Seri Dr. Mahathir Mohamad in (13) pages, dated 8 August 1997, p. 9. This unpublished letter bears ten names of Sisters in Islam. I would like to thank Zainah Anwar, one of the ten signatories, for providing me with a copy.

63 Abdul Aziz Bari, "Beauty Contests and the Syariah Laws," *The Sun*, Kuala Lumpur, 27 July 1997, p. 12.

Islamic law in Malaysia is administered according to the Administration of Muslim Law Enactments or ordinances. These Enactments are similar in content, yet there are differences between them, often important enough, to give them unique features of their own. Each Enactment establishes a Council of Religion of Islam, (Majlis Agama Islam) for the state. The Majlis can make rules on administrative matters such as collection, administration and division of *zakat* (legal alms), appointment of committees such as Legal Committees, Mosque Committees, and *Zakat* Committees, and it is vested with powers to issue *fatwa* on religious matters. Under the Selangor Administration of Islamic Law Enactment 1989, the "Islamic Legal Consultative Committee" consists of the Mufti as Chairman, the Deputy Mufti, the State Legal Advisor of Selangor, an officer of the Islamic Religious Department of Selangor to be appointed by the Majlis, and at least two, but not more than five, experts on Sharī'a to be appointed by the Majlis (Section 34(1)). The Syariah Court in each state operates separately from the Majlis; it is presided by a *Qādi* who is appointed by the Sultan, or by the Yang di-Pertuan Agong (King) for the Federal Territory, Penang, Melaka, Sabah and Sarawak, states which do not have a ruling Sultan of their own.

In issuing a *fatwa*, the Mufti, Legal Committee and the Majlis are required ordinarily to follow the orthodox tenets of the Shāfi'i school, but where the public interest so requires the *fatwa* may be given according to the tenets of the other schools of Islamic law. However a *fatwa* of this kind, that is, *fatwa* based on other than the orthodox views of the Shāfi'i school, often requires the approval of the Sultan. Section (39) of the Administration of Islamic Law (Federal Territories) Act 1993 authorises the Mufti, in the event where he considers that none of the reliable positions of "the four *madhhabs* may be followed without leading to a situation which is repugnant

to public interest, the Mufti may then resolve the question according to his own judgment" without being bound by the prevailing doctrines of any of the four *madhhabs* (for more detail see Section Four below). A *fatwa* may also relate to customary *adat* matters, and in some states the Mufti must have regard to *adat* in the performance of his functions.⁶⁴ The administration of Islamic law in every state is thus subject to modification by the Majlis in the light of the Malay custom and public interest.

The Selangor Administration of Muslim Law Enactment 1952 (revised in 1983 and 1989) specified a procedure whereby the State Mufti, who usually became chairman of the Legal Committee of the Majlis Agama Islam, could entertain requests for the issuance of *fatwa*. Thus according to Section (41) of the said Enactment :

- (1) Anyone may, by letter addressed to the Secretary, request the Majlis to issue a *fatwa* or ruling on any point of Muslim law or doctrine or Malay customary law. On receiving any such request, the Secretary shall forthwith submit the same to the Chairman of the Legal Committee.
- (2) The Legal Committee shall ... prepare a draft ruling. If such a draft ruling is unanimously approved by the Legal Committee ... the Chairman shall on behalf and in the name of the Majlis forthwith issue a ruling in accordance therewith.

The text continues in Section 41(2) to stipulate for the eventuality where the Legal Committee is not unanimous, in which case the issue must be referred to the Majlis, which may

⁶⁴ See for details Ahmad Ibrahim, "The Position of Islam in the Constitution of Malaysia", in Ahmad Ibrahim ed., *Readings on Islam in Southeast Asia*, p. 218.

issue a ruling based on the support of the majority of its members.

As for the legal effect of such a *fatwa*, the Selangor Enactment provided in Section (42(3)) that any ruling passed by the Majlis, whether directly, or through the Legal Committee, if the Majlis so determines, or if the Sultan so directs, be published by notification in the Gazette and "shall thereupon be binding on all Muslims resident in the state". The Administration of Islamic Law (Federal Territories) Act 1993 (and its equivalent enactments in other states) adopted the substance of the above procedure with minor modifications that gave greater prominence to the Mufti himself. Section 34(1) thus provided :

The Mufti shall, on the direction of the Yang di-Pertuan Agong, and may, on his own initiative, or on the request of any person made by letter addressed to the Mufti, make and publish in the Gazette, a *fatwa* or ruling on any unsettled or controversial question of or relating to Islamic law.

The equivalent provision in the Kelantan Malay Customs and Islamic Council Enactment (MAIK) was amended to the effect that the consent of the Sultan will be required before a *fatwa* can be gazetted. This amendment, which went into effect as of June 1998 changed the position where MAIK could gazette a *fatwa* without the Sultan's consent although the Council members were appointed by the Sultan. The main reason for the amendment was to draw a clear distinction between an official *fatwa* and the personal opinion of a religious leader. No religious leader should, as a result, claim to be entitled to issue a *fatwa*. The amendment "would prevent the opinions of religious leaders from being interpreted as *fatwa*."⁶⁵

65 "Sultan's Consent a Must for Fatwa Ruling," *The Star*, Kuala Lumpur, 23 June 1998.

It is generally agreed that a valid *fatwa* normally binds the Syariah court in the state in which it is concluded. The question, however, arose as to whether the *fatwa* binds the civil courts, which are courts of general jurisdiction in Malaysia. An answer to this is provided in the case of *Tengku Mariam v. Commissioner for Religious Affairs*⁶⁶ and *Commissioner for Religious Affairs v. Tengku Mariam*.⁶⁷ The issue here was over the validity of *waqf* (charitable endowment) wherein the disputing parties had agreed to submit the *waqf* document to the Mufti of Terengganu and to abide by his decision. The Mufti issued a *fatwa* declaring the validity of the *waqf* and the *fatwa* was gazetted. But the aggrieved heirs took the matter to the High Court of Terengganu. Justice Wan Sulaiman gave judgment to the effect that the *fatwa* was of no effect. He cited Section 25(4) of the Terengganu Administration of Muslim Law Enactment which upheld the superiority of the civil court over the Syariah court. He stated that the Enactment did not make the *fatwa* binding on the civil court, regardless as to whether the court itself or another interested party might have solicited the *fatwa*. Justice Sulaiman thus wrote :

I ... am of the view that even if it had been this court which had sought the *fatwa*, the court yet retains unfettered discretion as to how much of such *fatwa* it should accept, and may decline to be bound by it.⁶⁸

The case was appealed to the Federal Court, and its judgment, based on majority opinion, was delivered by Suffian J., with the concurrence of Lord President Azmi. While

66 [1969] 1 MLJ 110.

67 [1970] 1 MLJ 220.

68 Id. p. 227.

confirming the High Court decision, Suffian J. wrote : "In my judgment, Wan Sulaiman J. was right in ruling that he was not precluded by the gazetted *fatwa* from himself determining the validity of the *waqf*".

It thus seems likely that the *fatwa*, even if gazetted after approval by the Religious Council and the Mufti does not carry a binding force on the High Court, although it does bind the Syariah Court judges in that state. It is too early yet to determine whether the provisions of the Shari'a Criminal Offences (Federal Territory) Act 1997 (discussed below) would affect the position of the High Courts vis-a-vis the *fatwa* of the State Religious Council.

The jurisdiction of Syariah Courts is confined to a narrow range of subjects to begin with, but then further limitations are imposed on it under federal law. In the field of succession, testate and intestate, for example, account has to be taken of the Probate and Administration Act 1959 (revised 1972) and the Small Estates (Distribution) Act 1955 (revised 1972) with the result that the *Qādis* are in effect only given the function of certifying the shares to be allotted to the beneficiaries in undisputed cases under Islamic law. Chief Judge of the Syariah Court of Appeal, Sheikh Ghazali Abdul Rahman, confirmed the position in July 1998 when he said that "Syariah Courts must not intervene in disputes involving probate and estate administration as these matters fall within the jurisdiction of the civil courts." He said this when dismissing the appeal by the widow of Raja Nong Chik Raja Ishak, Zaiton Awang, who was Raja Nong's second wife and sought a court declaration to the effect that shares of Arensi Holdings (M) Sdn. Bhd., were a part of the estate of the deceased. "The shares are currently registered under the name of the deceased's son Raja Hazaruddin."

Sheikh Ghazali said that even though the parties involved in the case were all Muslim, he had no jurisdiction to hear the matter as he was bound by the ruling of Probate and Management Act 1959. Sheikh Ghazali who presided with judges Ahmad Ibrahim and Harun Hashim said he welcomed the appellant's counsel's attempt to broaden the Syariah Court jurisdiction but said nothing could be done as the Probate Act still prevailed. "However we feel that efforts should be taken to allow these matters to be transferred to the Syariah Court whenever Muslims are involved."⁶⁹

In the field of criminal law, under the Muslim Courts (Criminal Jurisdiction) Act, 1965, the jurisdiction of the Syariah Courts in respect of offences committed by Muslims

"shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars or both" (section 2).

The Muslim Courts (Criminal Jurisdiction) Act 1984 revised this and extended the Syariah Court jurisdiction to deal with cases punishable with imprisonment up to three years, or fines up to RM5,000 or caning up to six strokes or the combination of all these.⁷⁰ However, this amendment was relatively insignificant when it is compared, for instance, with that of the first class magistrate who can normally deal with offences punishable with imprisonment up to five years, or a fine up to RM10,000 or whipping up to twelve strokes or any combination thereof.⁷¹

69 Quoted by Arfa'eza Aziz, "Syariah CJ: Probate Rests With Civil Courts," *New Straits Times*, Kuala Lumpur, 9 July 1998, Section 1, p. 8.

70 See for details Ahmad Ibrahim, *The Malaysian Legal System*, p. 58.

71 Ahmad Ibrahim, "The Amendment to Article 121 of the Federal constitution," [1989] 2 MLJ xxi.

The fact that every state in Malaysia acted separately from other states led to disparities at various levels, and it was felt that a central organisation should be created to coordinate the administration of Islamic law at the national level. A step in this direction was taken in October 1968 by the Conference of Rulers to establish the National Council for Islamic Affairs. Its members are (a) a Chairman appointed by the Conference of Rulers (the Prime Minister is usually appointed); (b) a representative of each state in Peninsular Malaysia appointed by the Ruler concerned and (c) five persons appointed by the King with the consent of the Conference of Rulers. The functions of the National Council are to advise and make recommendations to the Conference of Rulers, State Government and State Religious Council on the administration of Islamic law with a view to encouraging uniformity among the various states of Malaysia. The Council has a Fatwa Committee that comprises the Muftis of all the member state and five other Muslim scholars appointed by the King.⁷²

A certain improvement in the status of the Syariah courts took place as a result of a 1988 amendment to Article (121) of the Federal constitution. Article (121) provides for the jurisdiction of the High Courts, the Court of Appeal, the Federal Court, but then adds : "(121A) The courts referred to in clause (1)⁷³ shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts".⁷⁴ Article (121) has thus demarcated the jurisdictional spheres respectively of the civil courts and Syariah courts. This has meant recognition of an independent status for the Syariah

72 *Id.*, p. 218.

73 *I.e.*, the High Courts and Subordinate Courts.

74 The Constitution (Amendment) Act 1988 (Act A 704).

courts, which, however, "needs to be supplemented by amendments to the existing laws, so that the Syariah courts will be better able to apply the Islamic law ... much remains to be done to bring up the Syariah courts and their officers to the status and position of the civil courts and their officers".⁷⁵ However, even with this amendment, the civil courts entertained the application of the Muslim party in matters which should otherwise be heard by the Syariah courts. Thus in *Shahamin Faizul Kung b. Abdullah v. Asma bt. Haji Yunus*,⁷⁶ According to Harun Hashim, a Supreme Court judge (as he then was) "what Article 121(1A) has done is to grant exclusive jurisdiction to the Syariah courts in the administration of Islamic law. In other words, Article 121(1A) is a provision to prevent conflicting jurisdiction between the civil courts and the Syariah Courts".⁷⁷ Harun S.C.J. added that "It is obvious that the intention of Parliament by Article 121 (1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah courts." Syed Hamid Albar, the Law Minister (as he then was) commented that the constitutional amendment to Article (121) was designed "to put a stop to civil court intervention in matters pertaining the Sharī'a law", and enable the Syariah courts to issue conclusive decisions in matters that fall under their jurisdiction.⁷⁸ The new amendment thus seeks to ensure that decisions made within jurisdiction by the Syariah courts are not reversed by the civil courts. It does not, however,

75 Ahmad Ibrahim, "The Introduction of Islamic Values", at p. 41.

76 [1991] 3 MLJ 327.

77 *Mohamed Habibullah bin Mamood v. Faridah Dato' Talib* [1992] 2 MLJ 793 at p. 803.

78 Syed Hamid Albar, "The Syariah and Syariah Courts in Malaysia", in Abdul Munir Yaacob ed., *Undang-Undang Keterangan di Mahkamah*, p. 34.

overrule the general jurisdiction of the High Court to overrule decisions of the Syariah courts, for it merely says that civil courts cannot exercise the Syariah court's jurisdiction. The new amendment, in other words, articulates what would normally be expected in matters of jurisdiction: no court may exercise the jurisdiction of another court; this by itself did not envisage any new development in the overall structure of the judiciary, and subsequent developments seem to endorse this.

The civil courts have, in fact, exercised the power of judicial review, assuming of course, that clause (121A) did not remove that, and have reviewed in at least three cases, the decisions of the Syariah courts on matters of jurisdiction.⁷⁹ In a 1997 case,⁸⁰ the plaintiff, Shaik Zolkaffily, appealed to the High Court of Malaya against the decision of the Religious Affairs Council of Pulau Pinang, over the correct interpretation of the provisions pertaining to *waqf* and will of the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993. The High Court in the event dismissed the defendant's plea that the High Court had no jurisdiction as the subject matter of *waqf* fell exclusively within the jurisdiction of the Syariah Courts. The court held instead that there was nothing in the Penang Enactment to empower the Syariah Court to adjudicate on the issue and that it was within the province of the High Court to interpret all state laws concerning the administration of Islamic law.⁸¹ The court added that Article 121(1A) of the federal constitution was not

79 *Mohamed Habibullah bin Mahmood v. Faridah Dato' Talib* [1992] 2 MLJ 793; *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah* [1994] 1 MLJ 690; *Tan Sung Mooi v. Too Miew Kim* [1994] 3 MLJ 117.

80 *Shaik Zolkaffily Shaik Natar & ORS v. Majlis Ugama Islam Pulau Pinang Dan Seberang Prai* [1997] 3 CLJ 70.

81 *Id.*, p. 72.

a written law that conferred any new jurisdiction on the Syariah Court. "It merely settles the issue of the concurrent jurisdiction of the High Court in that there is none when jurisdiction of a subject matter is given to the Syariah Court". Jurisdiction of the Syariah Court is determined by state law, and if the latter does not confer on the Syariah Court any jurisdiction to deal with any matter in the State List "the Syariah Court is precluded from dealing with that matter".

Developments in 1998

The issue over the Syariah court jurisdiction received extensive coverage more recently in the highly publicised case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor*⁸² at the High Court of Malaya, Kuala Lumpur in November 1998. In this case, Sukma Darmawan (hereinafter referred to as the applicant) appealed against the Kuala Lumpur Sessions Court decision of 19 September 1998 which had convicted him to six months imprisonment for an act of gross indecency under Section 377D of the Penal Code. The applicant had pleaded guilty to the charge of having allowed himself to be sodomised by the former Deputy Prime Minister, Anwar Ibrahim, but then he filed an appeal against the sentence and applied for writ of *habeas corpus* that he should be released forthwith. The applicant stated that the Sessions Court had no jurisdiction to convict him by virtue of the operation of Art. 121(1A) of the federal constitution (FC) of Malaysia and stated that his case should have been tried by the Syariah Court under the provisions of the 1997 Syariah Criminal Offences (Federal Territories) Act (Act 559). The details of this case are discussed under three sections as follow:

82 [1998] 4 CLJ 481-556.

(A) Statutory Provisions Relating to the Case

The main constitutional and statutory provisions that were referred to in this case were:

- (1) Section 377D of the Penal Code:

"Any person who, in public or private, commits, or abets the commission of or procures or attempts to procure the commission by any person of any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years."

- (2) Article 121(1) of the federal constitution provides:

"There shall be two High Courts of co-ordinate jurisdiction and status, namely, ... the High Court in Malaya (residing in Kuala Lumpur) and the High Court in Sabah and Sarawak) ... and such inferior courts as may be provided by federal law."

Article 121(1A) of the federal constitution then provides:

"The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

Matters that fall within the jurisdiction of the Syariah Court are indicated in the State List of the federal constitution but more specifically in Section 25 of the Act 559:

- (3) Section 25(2) of Act 559 provides:

"Any male person who commits *liwat* (sodomy) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof."

The question that the High Court had to address was whether Art. 121(1A) of the federal constitution read together with Section (25) of the Act 559 had overruled the jurisdiction of the Sessions Court in favour of the Syariah Court to adjudicate the applicant's admitted act of sodomy. To address this question, the court had to attempt a wide-ranging interpretation of the federal constitution in reference particularly to the State List, the Federal List and Article 121(1A).

(B) Analysis and Interpretation (Abdul Wahab Patail J. presided):

The first point which the court deliberated was that the State List by itself does not automatically create and empower the Syariah Court over the matters contained in that List unless there exists a State law which specifies the Syariah Court jurisdiction. For the State List is a list of matters over which the State Legislature is given power to legislate. It must therefore legislate in order to confer jurisdiction over those matters to the Syariah Court. The Court referred in this connection to the Supreme Court decision in *Mohammad Habibullah bin Mahmood v. Faridah bte. Dato Talib* [1993] 1 CLJ 264 where it was held that the civil courts can be denied jurisdiction in Shari'a matters "only when and to the extent the Syariah Courts are by law expressly conferred with such jurisdiction." The main point of this analysis evidently is that civil courts are courts of general jurisdiction in Malaysia and can try various offences that are created by the law of the land. Since the constitution (item 4, Federal List) and the Courts of Judicature Act 1964 provide for a single system of administration of justice, exceptions to its blanket jurisdiction can only be made by specific legislation.

The federal constitution (Art. 121(1A) has since 1988 made an exception in respect of the Syariah Courts, and Section 25 of Act 559 has specifically empowered the Syariah Court to adjudicate the offence of *liwat*; neither of these two points are in dispute. The dispute arises as to whether Section 25 actually overrides Section 377D of the Penal Code which also empowers the civil courts to adjudicate "acts of gross indecency" and punish them by imprisonment that may extend to two years. There seems, in other words, to be a case of competing jurisdictions over the offence at issue.

The second and still related point in the detailed analysis of the law in the case at hand concerns sentencing powers over criminal law matters. In dealing with the point the court has evidently taken a restrictive view of the relevant legislation and concluded that jurisdiction over criminal law matters can only be conferred by federal law. The court has in this connection reviewed Item (1) of the State List of the federal constitution which expounds the powers of the State Legislature to make law in respect of Islamic law in the areas especially of personal and family law including marriage, divorce, maintenance, adoption, legitimacy, guardianship, inheritance, *zakat*, *wakaf* and also to create and punish offences committed by Muslims against the precepts of Islam "except in regard to matters included in the Federal List." Item (1) then continues to provide concerning the power of the State Legislature to legislate on criminal law matters that the State Legislature "shall not have jurisdiction in respect of offences except in so far as conferred by federal law." These qualifications in the text of the constitution are understood to mean that the power granted to the State Legislature does not extend to criminal laws, and that the Syariah Court jurisdiction in criminal matters is therefore confined only to matters in which jurisdiction is clearly conferred by federal law. It was thus

concluded that "A Syariah Court is not a court of inherent jurisdiction. It is created by the power in Item 1, and it relies on federal law for its jurisdiction over offences." (p. 549, para g).

Third, the court drew a distinction between the power to make law and the court jurisdiction. Thus it was observed that there is "a very clear distinction" between a State Legislature's power to make laws under Article (74(2) of the federal constitution (i.e. in matters pertaining to Islam that are contained in the State List) and the jurisdiction of the Syariah Court under Article 121(1A) thereof. The constitution, while using the term "power" with regard to making laws in Article (74), avoided using the word in Article 121(1A). Instead the phrase used is "the jurisdiction of the Syariah Courts." The State List gave power to the State to make law in matters set out therein, one of the powers granted to the State is in respect of "creation and punishment of offences by persons professing the religion of Islam ... except in regard to matters included in the Federal List." The jurisdiction that is granted to the Syariah Court under the State law in criminal matters is therefore subject to the limitations that are determined by federal law. Federal law here obviously refers to the Penal Code, and the point debated is that where federal law and state law concur over a matter of concern to criminal law, the former is likely to take priority. (Cf. p. 540 para a, and 549 para d, e, f.).

Since the jurisdiction of Syariah Courts is dependent upon conferment by federal law, "the court therefore holds that Art. 121(1A) does not remove the jurisdiction of the Sessions Court over a Muslim for any offence jurisdiction over which has not been specifically conferred upon the Syariah Court." In the context of the present case, the court added the jurisdiction over the offences created by Section 377A or Section 377D of the Penal Code not having been conferred

upon the Syariah Court by federal law, the Sessions Court retains jurisdiction over these offences. (p. 552, para C).

(C) Offences of Indecency and *Liwat*

Offences of indecency under Act 559 can exist concurrently with offences of indecency under the Penal Code. The offence of *liwat* as defined in Act 559 consists of "sexual relations between male persons" (Section 25.2); it is an offence over which the Syariah Court has been conferred jurisdiction by federal law. The court clearly acknowledged this and observed that "therefore, and by operation of Art. 121(1A) of the federal constitution, the offence of *liwat* is solely within the jurisdiction of the Syariah Court and the Sessions Court has no jurisdiction whatsoever" (p. 540, para C). Having said this, the court added, however, that the offence of "gross indecency" under Section 377 of the Penal Code is one over which jurisdiction has not been conferred upon the Syariah Court by federal law. Hence, Art. 121(1A) of the federal constitution cannot operate to remove the jurisdiction of the Sessions Court therefrom. Consequently the applicant was lawfully convicted and sentenced by the Sessions Court. The court added with reference to the applicant's request for a writ of *habeas corpus* that in the event where a person is serving a sentence that is passed by a competent court, the writ of *habeas corpus* is not available (id. para h).

The court further elaborated the offence of "gross indecency" as expounded under Section 377(B, C and D) of the Penal Code that "gross indecency" is a broad term that can apply to a range of offences which include "carnal intercourse against the order of nature" with a child below the age of

fourteen, with a consenting adult or with a non-consenting adult, some of which are more serious than others, attracting terms of imprisonment between five and twenty years. The Penal Code exists under the power given to Parliament to make law in respect of criminal law and the Penal Code "is applicable to every person." It is also clear, the court added, that there is no corresponding offence of gross indecency in Act 559. Part IV of this Act, on the other hand, gives to the Syariah Court jurisdiction over specific offences relating to decency such as incest, prostitution, sexual intercourse out of wedlock, *khalwat* or close proximity and *liwat*. The court then added: But the "common denominator of all these offences, and the offence of *liwat* is that they are grossly indecent." Having acknowledged this, the court further added: "The fact that gross indecency and *liwat* are overlapping offences is immaterial." While jurisdiction has been conferred by federal law to the Syariah Court over the offence of *liwat* created under Section 25 of Act 559, no such jurisdiction has been conferred upon the Syariah Courts over the offences under the Penal Code. The court therefore concludes that the Sessions Court retains jurisdiction over the offence of gross indecency even if committed by a Muslim. (p. 553, para b, d).

The court elaboration on the powers of the Attorney General that immediately follows (on p. 553) may provide insight into the whole of the proceedings over this case. This is summarised as follows:

Article 143(3) of the federal constitution and Section 376 of the Criminal Procedure Code make it absolutely clear that the Attorney General has no power to institute any proceedings for an offence in a Syariah Court. Given this limitation the Attorney General/Public Prosecutor has elected to charge the applicant under Section 377D of the Penal Code. But where the public prosecutor has made a decision,

"it is not for the court to question that decision. His discretion is unfettered." A number of previous cases were cited to endorse the position that the court may not question the Attorney General's prerogative on this.

It is further stated that a court, before which a charge is produced, is only concerned with ensuring that all the elements of the charge are admitted, or in the event of a trial that all the elements of the charge are proven beyond reasonable doubt. The court did not, in other words, see it proper to refer the case to the Syariah Court nor to suggest the same to the public prosecutor. Once the Attorney General had presented the case before the court, the court proceeded with it as a matter of course.

It thus appears that both the Sessions Court and the Syariah Court had jurisdiction to adjudicate the offence of *liwat* in this case. But since the prosecution could not present it to the Syariah Court and presented it instead to the Sessions Court, the latter adjudicated the charge and passed judgment. Both the public prosecutor and the Sessions Court, and then subsequently the appeal court acted under the terms of Section 377D of the Penal Code, and justified their position by virtue of it being a court of general jurisdiction. Had the case been brought before a Syariah Court under Section 25 of Act 559 in the first place, that would have been a normal course to take.

It may be relevant to add, however in passing, that the case under review received wide publicity right from the start so much so that the episode was seen as a major political crisis in Malaysia due to the involvement therein of Dato Seri Anwar Ibrahim, the former Deputy Prime Minister of Malaysia. The civil court which is seen to have wider powers and is more resourceful, by comparison to Syariah Court, might have been seen to be a more appropriate place to adjudicate this case. The case became the focus of media attention, including inter-

national observers, so much so that the courtroom had to provide maximum space for participants and observers. Even the civil court could barely manage to cope with the blaze of publicity and the high drama that it entailed. As things stand, the Syariah Courts are not as well-equipped, which is perhaps why they were precluded from adjudicating this case.

It thus appears that the basic intention of the amendment to Article 121 of the constitution was to address problems arising out of conflicting jurisdiction and not so much as to create any new jurisdiction or introduce any basic changes to the status of the civil courts as courts of general jurisdiction in the country. This may be said to be in contrast to the position in Indonesia, where the judges of the civil courts and Islamic Religious Courts have the same status, position and salaries; they are all appointed by the President and belong to the same service and the two systems of courts are integrated within the unified legal system. In Malaysia, Syariah courts are not integrated into the federal legal system but belong to the state jurisdiction.⁸³

The position of Shari'a in Malaysia has remained, according to one observer, much the same "as it was during the British colonial administration".⁸⁴ Seen from a different perspective, it is noted by another commentator that Malaysian law takes its origins mainly from the West, yet "it has become a part of the life of the people of this country", and has as such been endorsed by public acceptance. For after all, the daily lives of Malaysians are regulated by this law and any radical change of the present legal system is bound to face an uphill struggle.⁸⁵

83 Cf. N. Yasin, *Islamisation*, p. 217.

84 Hamid Jusoh, *The Position of Islamic Law in the Malaysian Constitution*, 1991, p. 41.

85 Tengku Razaleigh Hamzah's opening speech to the Semangat 46 Seminar on 17 October 1993; an Eng. tran. of this speech appears in Rose Ismail, ed., *Hudud in Malaysia*, p. 57.

Professor Ahmad Ibrahim spoke critically when he wrote that the Muslims of Malaysia have "unfortunately slipped back and for the most part ceased to accept Islam as a way of life". Many take pride in regarding Islam as a religion "in the Christian sense" and do not believe that Islam has to be accepted as a guide in all aspects of life. He added that colonialism has influenced the division of Malaysian Muslims into the two camps of western-oriented and traditional oriented. Although Muslims can be said to hold their religion emotionally and by tradition, their way of life, politics and economics are no longer based on Islam.⁸⁶

It may be noted here that since 1983 the sphere of application of Islamic law has extended beyond family matters into economics and finance. These areas were previously the monopoly of English law but beginning in 1983 several laws have been passed by Parliament which relied on Sharī'a principles such as the Islamic Banking Act 1983, Government Investment Act 1983, and Islamic Insurance Act (*Takaful*) 1984, as well as government guidelines concerning Islamic financing scheme for civil servants buying motor vehicles, Islamic pawn shops and opening of Islamic banking windows in conventional banks, which evidently extend the Sharī'a into the sphere of public law.

The position of the Sharī'a in Malaysia remains nevertheless as the unequal part of a dichotomy, and the renewed interest that is shown in Sharī'a as a result of the years of Islamic revivalism has not led to substantive changes in the constitution and laws of Malaysia. But Islamic revivalism and successful experimentation in Islamic commercial law has had the impact, perhaps, of starting a fresh debate wherein many

86 Ahmad Ibrahim, "Islamic Law in Malaysia", *Journal of Malaysian and Comparative Law*, Vol. 8 (1981), p. 40.

Malay Muslims have spoken in support of the revival of Shari'a. Some of the more liberal minded Muslims have, however, favoured continuation of the legal status quo as envisaged under the constitution. Razaleigh Hamzah, the former minister, and president of the now defunct party Semangat 46 noted on the one hand that interest among the "Malays ... who want to see the teachings of Islam practised fully ... became more apparent since the mid-seventies. The demand ... is such that it must be given due attention".⁸⁷ Yet on the other hand, Razaleigh Hamzah referred to the multi-racial character of the Malaysian society and doubted the wisdom of imposing Islamic law on the non-Muslims: "Other ethnic groups who do not share our faith will definitely feel concerned about the possibility of implementing Islamic law and will view it as a way of forcing them to accept the religion".⁸⁸

87 Tengku Razaleigh Hamzah's speech, quoted in Rose Ismail, *Hudud in Malaysia*, p. 57.

88 Quoted in Rose Ismail, *Hudud in Malaysia*, p. 57.

CHAPTER FOUR

Issues in Polygamy

This chapter begins with a brief review of the Sharī'a law on polygamy and modern reforms that have been introduced on the subject in various Muslim countries. The rest of the chapter discusses polygamy under the Malaysian law.

(A) Sharī'a Law Reforms on Polygamy

Islamic law, in both its Sunni and Shi'i branches, permits a man to marry up to four wives at the same time on condition that he treats his wives equally. The Qur'ān thus rules: "Marry women of your choice, two, three or four, but if you fear that you will not be able to deal justly, then only one." (al-Nisā', 4:3) The Qur'ān also provides that "you shall not be able to be fair and just however much you wish to do so" (al-Nisā', 4:129). This latter text clearly indicates that the word '*adl*' (justice) in these *āyāt* has been used in its comprehensive sense, notwithstanding the suggestion by some that '*adl*' in the first *āyah* means equality in material and tangible matters, but that it refers to inner feelings, love and affection in the second. The text in either of the *āyāt* does not qualify the meaning of '*adl*' in any way whatsoever, and the Qur'ān cannot be said to

advocate a dual approach to justice in polygamy. The general and unqualified meaning of 'adl should therefore be held to prevail.⁸⁹

Assuming the permissibility of polygamy as a Qur'ānic dispensation that is understood from the immediate meaning of the text, two approaches could be taken toward interpretation. One would be to substantiate the Qur'ānic standards of justice so as to make polygamy legally difficult to obtain. The alternative approach would be not to emphasise equal justice and make polygamy easily obtainable. The majority of jurists have adopted this latter approach and minimised the legal implications of equal justice by rendering it largely a matter for the moral conscience of the husband rather than a matter to be determined by the court. Thus it was held that the second *āyah* only meant that a man could not control the degree of affection which he felt for his various wives. Justice does not, in other words, apply to matters of the heart and the show of love and affection. The early jurists also concluded that equal justice can only form a legal consideration after the polygamous marriage rather than a condition to precede it. They held this view despite the wording of the text "... if you fear – *wa in khiftum* – that you cannot do justice ...". For the fear of injustice in polygamy is bound to exist at every stage. In his writing on polygamy, al-Zuhāili has articulated the majority position when he stated: "'adl in this context does not mean equal treatment (*al-taswiyah*) in sentiment, affection and inclination of the heart; this is not intended simply because it is not within the individual's ability and control. For the Sharī'a only obligates the *mukallaf* in regard to what is within his control. There is

89 For details see Kamali, *Law in Afghanistan*, p. 130 ff.

no obligation (*taklīf*) in natural matters, such as love and hate, as they are beyond the will-power of the individual."⁹⁰ A variant view has been recorded by the Mu'tazilah to the effect that the conditions under which the Qur'ān permitted polygamy were impossible to fulfil, and that this practically amounted to a prohibition. They held that the word "*adl*" did not only mean equal treatment in matters of lodgement and maintenance but also complete equality in love, affection and esteem.

The majority of jurists are in agreement nevertheless that when a man fears that he will be unable to be just, polygamy is prohibited for him, but if he did in fact marry a second wife, he would have committed a sin only and the marriage would be legally valid. They reasoned that a man may fear injustice but may not incur it, or if he did, he may repent and do justice again. Thus the fear of injustice was held to be temporary and transient and a matter for the individual conscience that may not form the basis of a judicial order. The early jurists also held that the husband's financial ability is liable to change and it is possible that even if the man is poor at a certain point of time, he may become affluent later. Thus neither equality in favours nor the ability to maintain a second wife qualified as legal conditions to precede a polygamous marriage. Polygamy was therefore not open to the rulings of judicial authorities.

A variant view has been recorded by the Imams Mālik and Aḥmad b. Ḥanbal to the effect that absence of the fear of injustice is a condition for the validity of a polygamous marriage and that violation of this Qur'ānic provision vitiates the marriage contract. Mālikī texts also indicate that unfair treatment of the husband in a polygamous marriage might amount to prejudice (*ḍarar*), which entitles the wife to apply

90 Al-Zuhāilī, *al-Fiqh al-Islāmī*, Vol. VII, p. 168.

for judicial separation. The other leading schools take a different view of judicial separation (*tafriq*) on the basis of *darar* as I shall presently elaborate.

Modern legislation on polygamy in the present-day Muslim countries has on the whole departed from the conventional position that made polygamy a prerogative basically of the husband, and proceeds on the assumption that the Qur'ānic provisions on justice in polygamy are not devoid of legal import. The reforms that have actually been put in place are legal in character and made polygamy conditional on obtaining a court order. The law has empowered the judicial authorities to refuse permission to intending polygamists who fail to fulfil certain requirements. The response of traditional ulema to this development has been typically unfavourable. Al-Zuhaili represents this attitude when he notes that "judicial supervision over personal matters is tantamount to indulgence in futility (*amr 'abath*). For the judge may never know the true cause as knowledge of such hidden matters is usually not accessible to the people. Even when the judge is informed of the truth of the matter, this often proves to be scandalous to the confidentiality of marital life (*faḍḥan li-asrār al-ḥayāt al-zawjiyya*), amounting to interference in personal liberties and disregard of the sanctity of the human will (*ibdāran li-irādat al-insān*).⁹¹ The judges are thus advised to leave these matters alone and spend their precious time on other matters. For marriage is a totally personal matter (*amr shakhṣī baḥt*) so much so that no one can actually penetrate into or change anything therein.⁹¹

Polygamy is forbidden under the Tunisian Law of Personal Status 1956 and it generally constitutes a criminal offence, rendering a man who marries before his previous

91 Al-Zuhaili, *al-Fiqh al-Islami*, Vol. VII, p. 172.

marriage is dissolved liable to a penalty of one year's imprisonment and/or a fine of 240,000 francs, even if the new marriage happens to be unlawful (Art. 18).

Under the Iraqi Law of Personal Status 1959, marriage to more than one woman is allowed only by permission of the court, who may not grant it until two conditions are fulfilled: first, that the man is financially capable of supporting more than one wife; and second that there is a lawful benefit involved. (Art. 3). A man who violates these provisions is made liable to one year of imprisonment and/or a fine of 100 Dinars.

The Syrian and Moroccan laws also make polygamy dependent on a court order. The Egyptian Law No. 100 (1985, Art. 11) added certain provisions to its previous law No. 25 (1929) entitling the wife whose husband has married again to apply for a divorce. If she suffers a material or moral injury that renders continued marital life difficult, even if she has not stipulated in their marriage contract that he may not marry another woman. The judge shall attempt to reconcile the couple, failing which he shall order an irrevocable divorce. The existing wife loses this right on the lapse of one year from her knowledge of the new marriage.⁹²

Although the Jordanian Law of Personal Status 1976 imposes no obvious restrictions on polygamy, it allows the wife to stipulate in the marriage contract that the husband shall not take another wife and entitles the wife to sue for a divorce if such a condition is not honoured (Art. 19).

92 Cf. Nasir, *Personal Status*, pp. 67-68.

(B) Polygamy Under Malaysian Law

Reforms in the Islamic law of polygamy in Malaysia were mainly introduced under the Islamic Family Law (IFL) (Federal Territory), Act 1984 which required that an application for polygamy shall fulfil at least five conditions: the proposed marriage is "just and necessary"; the applicant has the financial means to support his existing and future dependants; the consent of the existing wife; the applicant's ability to accord equal treatment to his wives "as required by *Hukum Syara'*"; and that the proposed marriage does not cause "*darar syar'i*" (harm under the Sharī'a) to the existing wife or wives. The law also stipulated that the proposed marriage does not directly or indirectly lower the standards of living of the existing wife and dependants.⁹³

On receipt of the application, the Syariah Court summons the applicant and his existing wife or wives to be present at the hearing of the application, "which shall be in camera". The court may grant permission when the required conditions have all been met. A copy of the completed application is then served together with the summons on each of the existing wives.⁹⁴

To show that the proposed marriage is "just and necessary," regard must be had to circumstances such as sterility or physical infirmity of the existing wife, "physical unfitness for conjugal relations," wilful avoidance of an order for restitution of conjugal rights, or insanity.⁹⁵ As a result of that legislation, the decision to marry a second or subsequent wife no longer rested on the Muslim male in Malaysia. The

⁹³ Section 23, Islamic Family Law (Federal Territories) Act 1984.

⁹⁴ *Id.*, Section 23(5).

⁹⁵ *Id.*, Section 23(4)(a).

state authorities and Syariah Courts were thus entrusted with the responsibility to ensure that the application for polygamy met the requirement of justice that is stipulated in the Qur'ān (al-Nisā', 4:3).

The IFL 1984 clearly saw the necessity of consultation with the existing wife. Her experience of married life and cohabitation with her husband would inform and assist the court in ascertaining the character of the husband and his ability, or lack of it, to fulfil the stipulated conditions. The provisions of IFL 1984 are followed in most of the states in Malaysia, with the exception of Kelantan, Terengganu and Perak. The Islamic family law enactments in these three states do not contain the conditions that are stipulated in the IFL 1984 and the enactments of the other ten states.

The Kelantan Islamic Family Law Enactment 1983 merely provided, in section (19) that "No male person shall marry another woman at any place while he is married unless he has obtained a prior written consent of the Court of Qadhi," without, however, specifying any conditions under which such consent may be granted or refused. Section (21) of the Terengganu Administration of Islamic Family Law Enactment 1985 contains a provision similar to that of the Kelantan enactment. The Perak Islamic Family Law Enactment 1984 merely provides that "no man shall, during the subsistence of a marriage, contract another marriage except with the prior certification in writing of a judge," to the effect that the applicant had made a declaration before the judge that "he shall be fair toward his wives". This provision does not even require the consent of the judge but merely a declaration before the judge. The equivalent provisions of the Kelantan and Terengganu enactments do require a judicial consent but do not stipulate the detailed conditions that are adopted in the Federal Territories Act and the enactments of the other ten states.

In contrast, one may note the Johor Islamic Family Law Enactment 1990, which has an interesting provision that applies to a neglectful husband in a polygamous marriage:

"127(2) : any person who has more than one wife and has failed to give justice to the wives on maintenance, clothing, place of abode and other entitlements according to hukum syarak commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment."

The original substance and spirit of the family law reforms of the early 1980s were, however, largely eroded as a result of the amendments that were subsequently introduced.⁹⁶ Instead of reinforcing the original intention of the IFL 1984, the various states of Malaysia have introduced amendments, which have either changed or deleted the proposed conditions for polygamy. These amendments have had the effect generally of leaving the Syariah court judge to use his discretion to decide whether or not a husband is eligible to take another wife. Selangor and the Federal Territory of Kuala Lumpur were two jurisdictions, which had remained faithful to the original terms of the IFL reforms. Yet in 1988 Selangor deleted Section 23(4)(c) of its IFL enactment which had provided that the proposed marriage should not directly or indirectly lower the standard of living enjoyed by the existing wife and dependants. In 1994 Federal Territories followed suit by introducing a series of amend-

⁹⁶ A total of 39 amendments and new additions were introduced as a result of coming into force of the IFL (Federal Territories) (Amendment) Act 1994.

ments to the 1984 Act, which are specified, in reference to polygamy, as follows :

Section 23(1) of the 1984 Act had declared categorically that :

No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Syariah judge, contract another marriage, nor shall another marriage contracted without such permission be registered under this Act.

Then came the Islamic Family Law (Federal Territories) (Amendment) Act 1994, which added to the above text the following:

Provided that the court may, if it is shown that such marriage is valid according to *Hukum Syara'* order it to be registered subject to Section (123) (Amendment 9, of the 1994 Act).

Section (123) of the IFL 1984 makes liable a polygamous marriage that is contracted without the court permission to a fine of up to RM1,000 or a maximum of six months imprisonment or both. The court may, in other words, approve a polygamous union, even when contracted without the court permission, to be in accordance with the *Hukum Syara'* and order it to be registered, on the one hand, and penalise it under Section (123) on the other. To declare a polygamous marriage valid and in conformity with the *Hukum Syara'*, the judge would basically ascertain that the parties were in possession of their faculties to conclude a valid contract, ascertain the just character of the husband, and his financial ability to support another wife. Under the 1994 amendment, it would appear that the character evaluation of the intending

polygamist, and his financial capability are open to the discretion of the presiding judge. The more specific and detailed provisions of the 1984 Act have, in other words, been effectively set aside.

The 1994 amendment also deleted altogether one of the conditions that was laid down in Section (23) of the principal Act that the proposed marriage would not, "directly or indirectly, lower the standard of living that the existing wife or wives and dependants had been enjoying and would reasonably expect to continue to enjoy were the marriage not to take place".

Since the 1994 amendment removed the ban on the registration of polygamous marriages without the court order, it has likewise deleted certain sections of the principal Act (parts of Sections 108 and 109) concerning registration of marriages that are contracted outside the Federal Territories and in Malaysian embassies and consulates abroad. These can now be registered even when concluded without the permission of the court if they are otherwise in conformity with the Sharī'a.

Applications for polygamy can, as a result of these amendments, proceed without the court permission and without the consent of the first wife. Critics have called these amendments as "retrogressive" and contrary to the spirit of the original reform. For they assume as if polygamy is a right of every Muslim male and what was needed was to ensure that it is more easily accessible. Women's groups in Malaysia criticised the IFL amendments and demanded that they should be revised if the ruling authorities believed that Islam stood for justice and fair treatment for all.⁹⁷ Thus in a letter addressed to

⁹⁷ Sisters in Islam, "Ideal State of Marriage in Islam", *The Star*, Kuala Lumpur, 22 October 1996, p. 19.

the Prime Minister Dr. Mahathir, the women's groups reacted strongly as they wrote that "through amendments made by the various states, the original substance and spirit of this law reform has been violated".⁹⁸ In some states, such as in Perak, these amendments had the result that "the decision to contract a polygamous marriage rests solely on the husband". In Kelantan and Terengganu "the specific conditions for polygamy have also been deleted, leaving the Sharī'a judge to use his own discretion to decide on whether a husband is eligible to take another wife".⁹⁹

Attention was also drawn to the enforcement of the penalties for violations : Section (123) of the IFL 1984 penalises with imprisonment and fine the offence of practising polygamy without the court permission. In practice, however, this penalty has not been utilised : "As far as we know no man has been imprisoned for contracting a polygamous marriage without the court's permission. It is also rare for the maximum fine of RM1,000 to be imposed".¹⁰⁰ A more common practice is to impose a fine of RM300. It is then added that these random amendments to Section 23(1) had also encouraged husbands intending to practice polygamy to contract their proposed marriages outside their own states, if the state to which they belong happens to apply a stricter regime on polygamy.

Experience further shows that in granting permission for polygamy, Sharī'a judges in Malaysia emphasise, more than

98 Unpublished five-page letter (and seven pages enclosure) by Sisters in Islam and the Association of Women Lawyers entitled "Memorandum on Reform of the Islamic Family Laws on Polygamy submitted to the Prime Minister Datuk Seri Dr. Mahathir Mohamad", 11 December 1996, p. 3.

99 Id.

100 Id., p. 6.

anything else, a man's capacity to support a second wife, at the expense of almost all the other conditions which are stipulated under Section (23) of the IFL 1984. This situation was addressed in a 1990 judgment of the Selangor Sharī'a Appeals Court in the case of *Aishah Abdul Rauf v. Wan Mohamad Yusuf Wan Othman*.¹⁰¹ In this case the Appeal Court unanimously set aside the lower court's decision to permit Wan Yusof to take a second wife on the ground that he was able to maintain a polygamous household. The Sharī'a court had approved the husband's application on that basis alone. The appellant, the existing wife, appealed to the Sharī'a Appeal Court, which passed judgment to the effect that all conditions for polygamy set out in the Selangor Islamic Family Law Enactment are of equal importance and should be proven independently. In this case the respondent-husband had not given evidence to show that the conditions were satisfied, and that the marriage was just and necessary. The court stated that failure to fulfil one condition alone would have been sufficient for the lower court judge to reject the husband's application.

It is commonly known that the first wife is often threatened with divorce unless she gives consent before the judge. After the court appearance, she would return to the court to express her disagreement to the proposed polygamous marriage. It thus becomes all the more advisable for the judge to ensure that the consent of the existing wife is not obtained under duress.

Judicial attitudes tend to differ. It is of interest to note, for instance, that the Chief *Qāḍī* of Kelantan issued a circular in November 1991 to all the *Qāḍīs* in Kelantan drawing their attention to unsatisfactory implementation of Section (19)

101 [1990] 3 MLJ ix.

which had affected family harmony in the state. In that circular, the Chief *Qādi* directed the *Qādis* to carefully scrutinise the applications for polygamy before granting their consent, particularly regarding the financial means of the husband, and giving proper notification to the existing wife or wives.¹⁰² On the other hand in Perlis, where the statutory provisions follow the Federal Territories Act 1984, all applications for polygamy had been granted permission since 1993.¹⁰³

With a view to overcome these issues, the Association of Women's Lawyers and Sisters in Islam have made the following recommendations.

- (1) An integrated approach to the implementation of all the conditions for polygamy as are stipulated in the IFL 1984.
- (2) The applicant must be required to enclose specific supporting documents and provide responsible witnesses to attest to his character and ability to be fair and just and that the proposed marriage "would not cause *ḍarar syarie* (harm affecting the wife in respect of religion, life, body, mind, moral integrity and property)". A mere verbal declaration that the applicant would be fair, without supporting evidence is not sufficient. The existing wife must also be called to testify concerning the character of her husband.

102 Circular 1/91 of the Chief *Qādi*, Eng. trans. appears in Nik Noriani Nik Badli Shah, "Controversial Areas in the Law Relating to Marriage and Divorce in Modern Times : Possible Reforms Within Islamic Framework", Master of Comparative Law Dissertation 1996/97, International Islamic University Malaysia, p. 88.

103 Id.

- (3) The court should solicit medical and other evidence to prove that the wife is sterile, physically infirm, unfit for conjugal relations, insane or wilfully avoiding an order for restitution of conjugal relations.
- (4) The court should consider the applicant's statement of income, his income tax statement and other financial documents, including any source of income from his proposed second wife, to show that the living standard of the existing wife and children will not be adversely affected.
- (5) The applicant's intended wife should also be summoned to the court "to meet with the first wife for consultation to help her consider the realities of a polygamous marriage and whether the applicant can really fulfil the conditions required for such a marriage.
- (6) All states must adopt uniform laws on polygamy, using the Islamic Family Law Act 1984 in its original form before it was amended. "Perak, Perlis, Terengganu and Kelantan, in particular, must be advised to amend their enactments immediately to grant women better protection".¹⁰⁴

These reforms can be carried out at the initiative of the states themselves or by Parliament in order to ensure uniformity in the law. The federal constitution (Art. 76) confers power on Parliament to "... make laws with respect to any matter enumerated in the State List ... for the purpose of promoting uniformity of the laws of two or more states".¹⁰⁵

104 Sisters in Islam et al. "Memorandum on Reform", pp. 9-11.

105 Federal constitution 1957 (Art. 76(1)(b)).

Article (76) has, in the past, been invoked in the formulation of the National Land Code, The National Forestry Act, and the Local Governments Act. In the same manner, Parliament can pass legislation for a uniform law of polygamy for the whole of the federation. This approach is not however without drawbacks, one of which is that any law passed by Parliament under Article (76) does not come into force until adopted the State Legislative Assembly. The latter may or may not adopt it, or indeed adopt it with amendments. Thus even after promulgating a uniform law, Parliament cannot prevent a state from making whatever amendments it deems fit.

One way to deal with this drawback may be for the Government to advise the King to use his position under Article (3(3)) of the federal constitution as the head of the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan and in the states of Melaka, Penang, Sabah and Sarawak and His Majesty's home state of Selangor, to influence these five states and the two Federal Territories to adopt the uniform law passed by Parliament. This will hopefully set a persuasive precedent for other states to follow.

CHAPTER FIVE

Issues in Divorce

The initial part of this chapter provides an overview of the Sharī'a law of divorce and the reformist legislation on divorce that has been introduced in various Muslim countries. The three types of divorce in Sharī'a law that are reviewed are divorce by *ṭalāq*, divorce by mutual consent, and judicial divorce. The rest of this chapter addresses divorce in Malaysia under the Islamic Family Law (Federal Territory) Act 1984 and its subsequent amendment in 1994. The chapter ends with a discussion of *fasakh* divorce and relevant issues in the practice of the Syariah Courts.

(1) Sharī'a Law Reforms on Divorce

Marriage under the Sharī'a may be dissolved: (1) by the husband through *ṭalāq*; (2) by mutual agreement of the spouses; and (3) by a judicial order of separation (*tafrīq*) in a suit that may be initiated by either of the spouses.

1.1. Repudiation By *Ṭalāq*

All the leading schools of Islamic law recognise the right of the husband to unilateral divorce, or *ṭalāq*, and there is little

formality attached to the manner in which *ṭalāq* may be pronounced. A husband of sound mind who has attained the age of majority may thus pronounce *ṭalāq* orally or do so in writing without assigning any cause. Any words indicative of divorce may be used and the presence of witnesses is not a requirement, notwithstanding the fact that the Qur'ān contains a directive which requires such witnesses. The relevant Qur'ānic text thus provides. "When they (women) have reached their prescribed time (i.e. after *'iddah*) retain them with dignity or release them with kindness, and call two just witnesses from among you and give upright testimony for (the sake of) God" (al-Ṭalāq, 65:2).

فَإِذَا بَلَغَتُ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ
وَأَشْهِدُوا ذَوْيَ عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ.

And then according to the clear terms of a hadith, *ṭalāq* is "the most detestable of all permissible things in the eyes of God." These directives have, however, been considered, in the prevailing doctrine of Sunni jurists, as moral precepts addressed to the conscience of the husband rather than laying down positive rules of law. The majority of jurists have thus held that the presence of witnesses is recommended (*mandūb*) both in *ṭalāq* and in revocation (*rij'ah*) but that it is not obligatory. Some jurists attach the requirement of witnesses to *ṭalāq* only whereas others attribute it to revocation and not to *ṭalāq*. Ibn Ḥazm al-Zāhiri has held on the other hand that witnesses are a requirement in both the *ṭalāq* and *rij'ah*. Hence any one who pronounces a divorce without the presence of two just witnesses, or revokes a *ṭalāq* without them is a transgressor of the limits laid down by God Most High.

Due to the absence of formality and documentation in the Sunni law of *ṭalāq* it was generally possible for the husband

to pronounce a *ṭalāq* to take place immediately or to pronounce it such that it became effective upon the occurrence of a specified event in the future, in which case it was known as *ṭalāq al-ta'liq*, or suspended *ṭalāq*. The law also entitled the husband to delegate his power of *ṭalāq* to his wife, or to a third party, and the *ṭalāq* that was so exercised was known as *ṭalāq al-tafwīd*, or delegated divorce.

Ṭalāq in Sunni law has been classified according to the circumstances in which it is pronounced as either 'approved' *ṭalāq* (i.e. *ṭalāq al-sunna*), or 'disapproved' *ṭalāq*, that is, *ṭalāq al-bid'ah*. The former may consist of either a single pronouncement during a *ṭuhr*, that is, the period between two menstruations followed by abstinence from sexual intercourse for the period of *'iddah*, or it may consist of three pronouncements made during three successive *ṭuhrs*. In the former case, *ṭalāq* becomes final and irrevocable after the expiry of *'iddah*, which is normally about three months, whereas in the latter, it becomes final upon the third pronouncement. In both of these, the husband is entitled to revoke the *ṭalāq* and resume normal marital relations anytime before it becomes irrevocable. *Ṭalāq al-bid'ah* on the other hand causes an immediate rupture of the marriage tie and becomes irrevocable upon pronouncement. This may consist of a single pronouncement of *ṭalāq* which is expressly declared to be final, or it may consist of three *ṭalāqs* pronounced at once. The distinction in Sunni law between "approved" and "disapproved" forms of *ṭalāq* is, however, of a moral type as both forms are legally recognised. Of these two types, it was the "disapproved" variety which was most commonly practiced until the introduction in recent decades of reforms of the law of divorce in the Muslim world. More specifically, it was the triple *ṭalāq*, that is, three pronouncement of *ṭalāq* uttered on one and the same occasion, which was commonly resorted to in the Muslim countries and it was typically injurious to the wife.

1.2. Divorce by Mutual Agreement

All the schools of Islamic law have recognised divorce by mutual consent, known as *khul'*, and *mubāra'a*. *Khul'* is effected with the consent and initiative of the wife who gives her husband a consideration, usually by returning the dower she received from him, for her release from the marital tie. But the consideration so given is not linked to the dower as it may consist of any amount, indeed a token amount that signifies earnestness of intention. The wife's failure to pay the consideration does not invalidate the divorce either, for *khul'* is essentially a contract which is effected by an offer of consideration by the wife, and acceptance of that offer by the husband. Once the offer is accepted, *khul'* operates as a single irrevocable *ṭalāq*. *Mubāra'a*, like *khul'*, is a form of divorce by mutual consent of the spouses. The difference between the two being that when discord is on the side of the wife and she desires a divorce, it is called *khul'*, but when discord is mutual and both desire a divorce, it is called *mubāra'a*. The offer of divorce may proceed from either side, but once accepted, divorce is complete and it operates as a single irrevocable *ṭalāq* as in the case of *khul'*.

The law requires the divorced wife to observe a waiting period, known as *'iddah*, following any divorce except divorce following a marriage which is not consummated. The *'iddah* normally lasts three menstrual cycles, but if the wife is pregnant at the time of pronouncement of *ṭalāq*, her *'iddah* continues until the delivery of the child. *'Iddah* is primarily desinged to facilitate reconciliation, and also discovery of pregnancy, and the wife remains entitled to maintenance for the duration of *'iddah*.

1.3. Judicial Divorce

The traditional Islamic law of divorce, which hardly

recongises judicial divorce, has undergone considerable change in almost all Muslim countries during the twentieth century. Modern legislation of the law of divorce has generally pursued two principal objectives of increasing the remedies available to the wife in the event of an injurious *ṭalāq* on the one hand, and restricting the exercise of the husband's power of *ṭalāq* on the other. Another feature of these reforms is the prominent role that is assigned to the court of law in the determination of a judicial divorce. The Māliki, Shāfi'i and Ḥanbali schools permit the wife to demand a judicial separation (*tafrīq*) in the event of the husband's affliction with a serious disease, his failure to maintain his wife, injurious treatment (*ḍarar*), and prolonged desertion. As will later be elaborated, the Ḥanafi law which commands the largest following of all the leading schools is exceedingly restrictive over judicial divorce. This imbalance in the rights of the spouses concerning divorce has been the focus of attention in modern law reform. Questions were thus raised as to whether the juristic doctrines of the medieval era have failed to give due attention to the objectives of equality and justice that are so emphasised in the Qur'ān and Sunna.

The Syrian Law of Personal Status 1953 (*Qānun huqūq al-ā'ila*, Decree law No. 59, 1953) was the first in a series of Middle Eastern legal codes which introduced important reforms in the Islamic family law. In its preamble to the section on divorce, this law stated that "the true purposes and conditions of divorce in Islam have sadly been misconstrued by the jurists of the past whose doctrine has led to a lack of security in married life," and that their exercise of excessive care to avoid any possible danger of breaking the law had often produced the opposite results. In this situation, the proper policy was to "return to the origins of the law of divorce in Islam and adopt from outside the four (Sunni) schools provisions which will be

conducive to public welfare."¹⁰⁶ But the actual reforms of the divorce law that were introduced under the Syrian legislation were not as far-reaching as the preamble had anticipated. Briefly, the triple *ṭalāq* was no longer to operate as an immediate and final rupture of the marital tie; it was to count as a single revocable *ṭalāq*. The Syrian law also authorised the court to grant compensation to the wife who may have suffered harm by her husband's repudiation without reasonable cause. Both of the spouses were entitled to apply to the court for divorce on ground of injury by the other and the judge was to effect an irrevocable divorce between them if all attempts at reconciling them proved unsuccessful.

One of the principal Qur'ānic guidelines on divorce that merits attention is undoubtedly its declaration of basic equality in the rights and obligations of the spouses in divorce, which is as follows:

And the divorced women shall observe three courses upon themselves; it is not lawful for them to conceal what God has created in their wombs ... and they (i.e. the divorced women) have rights similar to those which men have over them in a just manner (*wa lahunna mithl al-ladhī 'alayhinna bi'l-ma'rūf*), but men have a rank above them (al-Baqarah, 2:228).

وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ . . .
وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِنَ دَرَجَةٌ .

This *āyah* alone can provide the basis of an egalitarian law of divorce in which men and women would have equal rights and obligations. However, as I have elaborated elsewhere, the classical expositions of the divorce law have fallen short of this

106 For details Anderson, "The Syrian Law of Personal Status," BSOAS, XVII (1955), 39 ff.

ideal.¹⁰⁷ One question that has exercised the minds of the early jurists and commentators was whether similarity of rights in this *āyah* should be confined to specific issues, or should apply, as a general rule, to all aspects of divorce law. The early Qur'ān commentators, including al-Ṭabari, al-Qurṭubi, al-Zamakhshari, and al-Rāzi, have on the whole focused on non-legal matters and upheld an early report attributed to Ibn 'Abbas which highlighted pleasant appearance, mannerism and dress as the proper purport of this *āyah*. This is clearly unsatisfactory and tends to evade the basic theme of the *āyah* quoted above. Without wishing to engage in details, it may be noted in passing that the twentieth century Qur'ān commentators, including Rashīd Riḍā, Mustafā al-Marāghī, Sayyid Quṭb and Maḥmūd Shaltūt have considered the text under discussion as a general principle (*qā'idah kulliyya*) and a "truly significant declaration" to the effect that women are equal to men in all rights except in one matter which is that men are responsible for providing maintenance for women, a subject which has been clearly referred to in another Qur'ānic *āyah* (al-Nisā', 4:34 cited ...) This is held to be the point of reference in the assignment to men a rank above women.¹⁰⁸

The Tunisian Law of Personal Status 1956 (as amended by Law No. 7, 1981) was by far the most far-reaching in its abolition of extra-judicial divorce whether by *ṭalāq* or by mutual consent by providing simply that "any divorce outside the court of law shall be devoided of legal affect." Article (31) of this law provided that a decree of divorce will be granted:

107 See for details Kamali, "Divorce and Women's Rights: Some Muslim Interpretations of S. 2:228," *The Muslim World*, LXXIV (1984), 85-100.

108 Cf. Rashīd Riḍā, *Tafsīr al-Qur'ān al-Hakīm*, II, 375; see also al-Marāghī, *Tafsīr al-Marāghī*, II, 167; Sayyid Quṭb, *Fi Zilāl al-Qur'ān*, I, 72; and Maḥmūd Shaltūt, *Tafsīr al-Qur'ān al-Karīm*, p. 182.

firstly, on a petition by the husband or wife based on any of the grounds specified in the law (broadly the grounds known in Māliki law); secondly, in cases of mutual consent; and thirdly, when either of the spouses insist on ending the marriage, in which case the court will determine any financial compensation which either party may have to pay to the other (Art. 30, and 31). However, the law adds that the judge shall not order divorce except after doing his utmost to reconcile the spouses.

In Pakistan, the Family Laws Ordinance of 1961 requires all forms of divorce, whether by the husband or by the agreement of the parties, to be reported in writing to the Arbitration Council. No divorce could as a result become final until ninety days have elapsed after the delivery of this notice, and an attempt is made in the meantime at reconciliation during this period. Similarly, in the landmark case of *Khurshid Bibi v. Muhammad Amin*,¹⁰⁹ the Supreme Court of Pakistan declared that the wife could demand a *khul'* divorce as of right provided that she is prepared to pay a compensation by returning the dower she had received from her husband.¹¹⁰

The following grounds of judicial divorce have generally been recognised by the laws that are currently applied to the Muslims of Middle East and Asia:

- (a) injury or discord;
- (b) a defect on the part of the husband;
- (c) failure to pay maintenance;
- (d) desertion, absence and imprisonment.

109 PLD, 1969, S.C. 97.

110 Cf. Kamali, *Law in Afghanistan*, pp. 190-191.

Each of these may briefly be explained as follows:

(a) Injury or Discord

The two Imams, Mālik and Ibn Ḥanbal, maintain that the wife may ask the judge to order divorce if she claimed that the husband has caused her such an injury as to make continued marital life between them impossible. Imams Abu Ḥanīfa and Shāfi'i have disagreed and held that injury is not a valid ground for divorce but that the husband may be reprimanded and punished for it. According to the first view, the judge must attempt to reconcile the spouses, and may appoint arbitrators, one from each side, for the purpose, but if the attempt at reconciliation is unsuccessful, the court may order an irrevocable divorce. The Imams Abu Ḥanīfa, al-Shāfi'i and Ibn Ḥanbal make the arbitrators' decision on divorce subject to approval by the husband. Should the two arbitrators fail to reach a consensus, the judge should order them to investigate further, but if they fail again, he shall appoint two other arbitrators and their award shall be binding. This is all based on the Qur'ānic *āyah*: "And if you fear a breach between them, appoint an arbiter from his folk and one from hers. If they desire amendment, God will make them of one mind ..." (al-Nisā', 4:35).

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ
وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا.

According to another Qur'ānic *āyah* "Divorce must be pronounced twice and then (the wife) must be retained in honour or released in kindness" (al-Baqarah, 2:229 and 231).

فَإِمْسَاكِ بُعْرُوفٍ أَوْ تَسْرِيحٍ بِإِحْسَانٍ.

The jurists have also quoted in this context the hadith that "injury must neither be inflicted nor reciprocated." Modern legislation in many Muslim countries has adopted these provisions (Egyptian Law No. 25/1929 as amended by Law No. 100/1985, Arts. 6-11; Syrian Law of Personal Status, Arts. 112-115; Tunisian Law of Personal Status 1956, Art. 32 as amended by Law No. 7/1981; Moroccan Law, Art. 56; Iraqi Law, Arts. 40-42; Jordanian Law, Art. 132; Algerian Law, Art. 53, and Kuwaiti Law, Art. 126-135). Some of these laws also contain provisions authorising the court to order payment of compensation to the wife who might have suffered material or moral harm as a result of the husband's divorce.¹¹¹

b. Illness and Defect

The leading schools of Islamic law have held different positions with regard to the validity or otherwise of judicial divorce (*tafrīq*) on the basis of illness or defect on the part of the husband. The Zāhiris do not consider illness of any kind as a valid ground for divorce. The Ḥanafī and the Shī'a Ithnā 'Ashari schools allow *tafrīq* only in the event of the husband's impotence, provided that the wife applies to the court for divorce, and that she has not known about it at the time of marriage, and also that she applies for divorce immediately after she knows of her husband's impotence. The Ḥanafīs maintain that dissolution of marriage is the exclusive right of the husband, with the court having the right to intervene in the event only of a serious genital defect such as impotence or castration. Imam Abu Ḥanifa's disciple, al-Shaybānī has added madness, leprosy and elephantiasis as valid grounds for the judicial dissolution of marriage. The Shāfi'is, Mālikis and Ḥanbalis have on the whole concurred with al-Shaybānī and

111 Cf. Nasir, *Personal Status*, p. 126 ff.

granted the wife the right to apply to the court for divorce on specific grounds; they have entitled either of the spouses to do so in the event of serious illness and defect on the part of the other. This more liberal interpretation was initially adopted in the Ottoman Law of Family Rights 1917, which is essentially the law that is now applicable to the Sunni Muslims of Lebanon, Syria, Morocco, Iraq, Jordan and Algeria. The law in many of these jurisdictions specify that the disease in question is either incurable or takes a very long time to cure, and that the wife had not consented after having known of the defect. The court is generally empowered to order an irrevocable divorce at the wife's requests. Al-Shāfi'i considers such a divorce a decree of annulment (*faskh*) since it is not effected by the husband personally of his own free will. This is, in fact, the position taken in Malaysia where judicial divorce in almost all its varieties take the form of divorce by *fasakh*. The Islamic family law enactments in Malaysia, as reviewed below, provide for a number of grounds on which annulment by *fasakh* can take place.

c. Failure to Pay Maintenance

Muslim jurists differ as to whether the husband's failure to maintain his wife provides a valid ground for divorce. The Ḥanafī and the Shī'a refuse to recognise this as a ground altogether and they quote to this effect the Qur'ānic *āyah*: "Let him who has means spend of his means; as for him whose provision is measured, let him spend of that which God has given him." (al-Ṭalāq, 65:7).

لِيُنْفِقْ ذُو سَعَةٍ مِّن سَعِيهِ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُفِقْ مِمَّا آتَاهُ اللَّهُ

As for the affluent husband who wilfully refuses to support his wife, the court may sell his property, or punish him until he

complies. The other three Imams, Mālik, Shāfi'i and Ibn Ḥanbal allow a divorce at the request of the wife on the ground of the husband's failure to maintain his wife and quote to this effect the Qur'ān that "... (the wife) must be retained in honour or released in kindness ..." (al-Baqarah, 2:229)

الطَّلَاقُ مَرَّتَانٍ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيءُ بِأَحْسَنِ .

saying that failure to maintain does not conform to "retention with honour." They also held that failure to maintain amounts to *ḍarar* which is proscribed by the hadith "*lā ḍarara wa lā ḍirāra fī'l-Islam*."

Modern legislation in most of the Muslim countries of today including Egypt, Syria, Morocco, Iraq, Jordan and Algeria adopted the majority position and made provisions that entitle the wife whose husband has property but refuses to support her to apply for a judicial divorce on this ground after the expiry of generally about three months.¹¹²

d. Desertion or Imprisonment

The Imams Mālik and Ibn Ḥanbal consider the husband's absence or his imprisonment as valid grounds of divorce if they cause actual injury to the wife. Whereas Ibn Ḥanbal sets the time frame at six months' absence without a reasonable excuse as a minimum requirement, Imam Mālik is said to maintain the minimum duration at one year, and according to another view, at three years. The wife is similarly entitled to seek a divorce after one year of the husband's stay in prison. Imam Mālik considers the dissolution that ensues as an irrevocable divorce whereas Imam Ahmad Ibn Ḥanbal regards it as an annulment. Legislation in the Muslim countries of the Middle East generally take these as basic guidelines but tend to vary in respect of detail.¹¹³

112 Cf. Nasir, *Personal Status*, pp. 137-139.

113 See for details, Nasir, *Personal Status*, p. 140.

II. Divorce Under Malaysian Law

Under the IFL 1984, a Muslim man wishing to divorce his wife has to apply on a prescribed form on which he must state his reasons and say whether reconciliation has been attempted. Only if this is unsuccessful may the Syariah Court permit the husband to pronounce one *ṭalāq* and record the divorce. A *ṭalāq* pronounced outside the court has no juridical value and could incur a fine. The IFL enactments also made provisions for initiation of divorce proceedings by the wife through annulment (*faskh*) on appropriate grounds, through claiming non-observance of prenuptial conditions that the spouses had agreed for a suspended (*ta'liq*) divorce, and through divorce by mutual consent (*kbul*¹¹⁴). The IFL enactments also regulate in some detail other aspects of breakdown relating to maintenance, disposal of joint property, and custody of children, all of which are subject to court intervention and will be referred to in the following pages.

Reform of the divorce law in Malaysia, according to Professor Ahmad Ibrahim, manifested an attempt at implementing the Qur'ānic requirement, addressed to the husband, of "kindness and equitable treatment" that he must grant to his estranged wife (Sura al-Baqarah, 2:231). This would naturally mean that the husband should avoid exercising his power of *ṭalāq* so as to injure or take advantage of the wife. To realise this objective, it was highly recommendable that "all pronouncement of *ṭalāq* should be made before the Syariah Court and with the permission of the court".¹¹⁴ In the event where the *ṭalāq* is pronounced outside the court and without the permission of the court, the husband should be liable to punishment under the law, but "the court will still take action"

¹¹⁴ Ahmad Ibrahim, "Justice in the Syariah Court," in Aidit Ghazali, ed., *Islam and Justice*, p. 101.

as Professor Ahmad Ibrahim added "to decide whether the *ṭalāq* is valid according to Islamic law or not".¹¹⁵ The latter part of this interpretation evidently read the Sharī'a separately from the provisions of the IFL 1984, as it envisaged the possibility that the court may still declare valid a *ṭalāq* that is pronounced outside the court. The IFL 1984 has not addressed the issue and has not actually declared that a *ṭalāq* pronounced outside the court is invalid. It merely stipulated in Section (124) that a man who divorces his wife by the pronouncement of *ṭalāq* "outside the court and without the permission of the court commits an offence," which is punishable with fines or imprisonment. One would have thought that this legal text could equally be interpreted to the effect that *ṭalāq* pronounced outside the court was invalid. This approach was, however, not attempted and evidently did not find favour with the subsequent amendment in 1994 of the earlier legislation. A new Section (55A), introduced in 1994, provided for the court to approve the pronouncement of *ṭalāq* by the husband "outside the Court and without permission of the Court ... if the court is satisfied that the *ṭalāq* that was pronounced is valid according to Hukum Syara'." The husband is under duty, however, to report the *ṭalāq* so pronounced to the Court within "seven days of the pronouncement of *ṭalāq*," and the court is under duty in turn to "ascertain whether the *ṭalāq* that was pronounced is valid according to Hukum Syara'". A valid *ṭalāq* in Sharī'a can be pronounced by the husband who is in possession of his faculties and the words so uttered are indicative of his intention to divorce – and that there is, of course, a subsisting marriage. When the court is satisfied as to the validity of the *ṭalāq* pronouncement, then it shall make an order, subject to Section (124) of the

115 Id.

principal Act, to (a) approve the divorce by *ṭalāq*; (b) record the divorce; and (c) send a copy of the record for registration to the appropriate Registrar or Chief Registrar.

Moreover, Section (124) of the principal Act makes "a pronouncement of *ṭalāq* in any form outside the court and without the permission of the court" a punishable offence liable to a fine of up to 1,000 ringgit or a maximum imprisonment of six months. The 1994 amendment has not changed this, and envisages therefore a situation whereby the court simply imposes the penalty even if it approves the *ṭalāq* as being in accordance with 'the *hukum syara*'. The new amendment is thus not without complexity as it puts the judge in a difficult situation of (a) punishing a *ṭalāq* pronounced outside the court and without the permission of the court; and (b) actually approving its validity under the Sharī'a and order its registration. Further complication is likely to arise in answer to the question whether the punishment is applicable only to a *ṭalāq* that has not been reported within the seven days or even if it is reported within that time. What of the unreported cases of *ṭalāq* pronounced out of court? Can the court also approve them as valid *ṭalāq* in accordance with the Sharī'a? These questions would seem to call for further clarification. The general impression, however, is that the 1994 amendment has in effect overruled the reform measures that were earlier introduced. The substance of that reform was to prevent unilateral declarations of *ṭalāq* by irresponsible husbands. "With these amendments, we are back where we started", wrote the National Council for Women's Organisations, Sisters in Islam, and the Association of Women Lawyers in a joint memorandum submitted to the Government of Malaysia in March 1997. This letter also expressed the concern that the 1994 amendment will encourage "more men to divorce their wives outside the court and thus enable them to avoid their responsibilities toward

their wives and children".¹¹⁶ A 1996 survey conducted by the Women's Crisis Centre in Penang led to the finding that the number of men who pronounced the *ṭalāq* outside the court and in contravention of the law is more than three times those who applied for divorce through the court.¹¹⁷

The signatories of the above-mentioned memorandum proposed that the amended Section (55) should be repealed and the original Section (55) should be reinstated, which means that there should be no extra-judicial divorce outside the court, and that every *ṭalāq* pronounced without the court permission should in all cases be liable to punishment as provided for under the IFL 1984. With regard to the quantum of punishment for violators, it was also suggested that the law should provide a minimum fine of RM1,000 and a mandatory custodial sentence of not less than four weeks. The maximum fine should be increased to RM5,000 and the maximum sentence should be extended from the present six months to one year.¹¹⁸ It is thus stated that "Few other provisions in law are violated with such impunity and regularity as the divorce provisions under the Islamic Family Law statutes".¹¹⁹

Two other aspects of divorce law in Malaysia which have given rise to frequent disputes before the Syariah courts are over the suspended divorce (*ṭalāq ta'līq*) and gift of consolation (*mut'ah*). With regard to the first, the IFL enactments in many states entitle the prospective spouses to

116 National Council for Women's Organisations et al, "Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia". Formulated and approved at the National Workshop on Reform of Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia on January 4, 1997, p. 4.

117 Id.

118 Id., p. 5.

119 Id.

enter an agreement whereby the husband authorises the wife to apply for a divorce in certain eventualities, such as his failure to maintain her for a period of four months, leaving or neglecting her, or causing hurt to her person. Under the IFL enactments that are currently in force in many states of Malaysia (except for Perlis which does not provide for a *ta'liq* agreement), the Registrar of marriages makes available a form for this purpose which is completed at the time of registration. The form when duly completed is known as the *ta'liq* certificate and it becomes a part of the marriage contract. The IFL 1984 allows every married woman who is "entitled to a divorce in pursuance of the terms of a *ta'liq* certificate made upon a marriage" to apply to the Syariah Court to declare that such divorce has taken place (s. 50(1)). The court then examines the application and investigates the valid occurrence of the alleged *ta'liq* divorce and if satisfied that the divorce is valid according to *Hukum Syara'* confirms and records the divorce (s. 50(2)).

The main problem encountered in *ta'liq* proceedings is the protracted court delays and difficulties over proof. Women's groups and critics have expressed dissatisfaction over this and highlighted the case of *Mohd. Habibullah bin Mahmood v. Faridah bt. Dato Talib*,¹²⁰ which took six years before the plaintiff was finally granted a divorce after she applied for a *ta'liq* divorce in 1989 on the ground that her husband had abused her. The Selangor Syariah Court rejected her application for divorce because of her husband's allegation that she was refractory (*nusyuz*) and neglected her marital obligations toward him. It took a declaration of apostasy, a failed attempt to have her case heard in the civil court, followed by

120 [1992] 2 MLJ 793.

intervention by the Syariah Court of another jurisdiction before divorce was finally granted in 1995.

Women tend to be faced with difficulties in obtaining a *ta'liq* divorce especially in cases when they claim ill-treatment and abuse against the husband. It was thus stated in a seminar paper prepared by women's groups that "the court has often rejected medical and police reports of violence, demanding instead eye witness evidence". In cases of desertion, the court often goes to extraordinary lengths to trace the whereabouts of the husband instead of relying on the available evidence regarding the alleged desertion. The court is often reluctant to grant a divorce as provided for under Section (50) of the IFL "even when the husband has failed to maintain the wife for years".¹²¹ A newspaper report has it that "in one case the court did not grant a woman *ta'liq* divorce even though she was physically abused and not given maintenance, and her husband was also a drug addict who had been sentenced to jail before." She was instead ordered by the court to be loyal to her husband, but the question arose "as to how the court could come to such a decision when the man was not even present in court."¹²²

Another point raised with regard to *ta'liq* proceedings is a certain lack of uniformity among the various state enactments. The current *ta'liq* agreement varies from state to state; Perlis does not even provide for a *ta'liq* agreement. It is consequently suggested that a standard *ta'liq* agreement should be adopted by all the states preferably on the following grounds :

- Failure to maintain for four months;
- Desertion for six months;

121 "Memorandum on Reform of Islamic Family Law", p. 8.

122 Muharyani Othman and Fatimah Abu Bakar, "Time for a Reality Check," *New Straits Times*, Kuala Lumpur, 16 March 1998.

- Any action that causes injury or, *darar shar'i* to the wife;
- Any other grounds that the parties may agree to, including, for example, the husband's taking another wife. There is at present no provision for redress in cases where the husband contracts a polygamous marriage without the agreement of the existing wife.

And finally it is suggested that a new provision should be adopted to make it mandatory for the court to issue an order in default of appearance for the dissolution of the marriage, in the event, for instance, when the husband is absent for a maximum of three occasions within a maximum time frame of six months.¹²³

With regard to *mut'ah*, the IFL 1984 provides, under Section (56), that in addition to her right to apply for maintenance, a woman who has been divorced without just cause may apply to the court for *mut'ah* or consolatory gift, and the court may, upon being satisfied that the woman has been divorced without just cause, order the husband to pay "such sum as may be fair and just according to Hukum Syara'". Substantively similar provisions can also be found in the Islamic family law enactments of other states.¹²⁴ Critics have stated, however, that these provisions fail to provide detailed guidelines to assist the court in assessing the "fair and just" sum to be paid as *mut'ah*, and what is fair and just is therefore very much left to the discretion of individual judges.¹²⁵

It is now generally understood in Malaysia that *mut'ah* is an obligatory compensation that must be paid to a divorced wife in all cases of divorce which was not caused by her. The

123 Id.

124 Cf. Section (44) of the IFL Enactment of Kelantan 1983.

125 Cf. Nik Noriani, "Controversial Areas", p. 149.

main issue that is highlighted in many of the cases before the courts is over the quantum of *mut'ah* that should be paid to her. The difference between the amount claimed by the wife and the offer made by the husband may be disproportionately large. The wife's right to *mut'ah* itself may be at issue when the wife herself has asked for a divorce. A perusal of the court cases on this subject shows that various factors are taken into account, including the wife's contribution to the family wealth, her negligence of marital obligations and *nusyuz*, the duration of married life, the husband's income, the wife's own financial status etc., resulting in disparities in court decisions that have given rise to a demand for detailed legislative guidelines that should assist the court in the determination of the quantum of *mut'ah* that would hopefully be consistently applied by all the states.

Another feature of the IFL amendments on divorce is related to the court proceedings over ancillary reliefs. The 1994 amendments relaxed the strict requirements of the IFL 1984 on custody, maintenance and *mut'ah* which were to be determined first before the court issued an order of divorce. Section (55) of the principal Act thus disallowed registration of the divorce unless the Chief Registrar was satisfied that "The Court has made a final order or orders for the custody and maintenance of the dependent children, for the maintenance and accommodation of the divorced wife and for the payment of *mut'ah* to her". The amended version of this section removed all reference to custody, maintenance and *mut'ah* and simply provided :

"No pronouncement of *talāq* or order of divorce or annulment shall be registered unless the Chief Registrar is satisfied that the Court has made a final order relating to it".

All that the Chief Registrar is required as a result of this amendment is to ensure that the divorce itself has taken place without having to ascertain the custody and maintenance issues. The basic rationale of the new amendment, which was to avoid delays, was understandable, yet the uncertainties that are caused as a result are unjustified. A possible compromise has been suggested by the women's organisations of Malaysia in the form of setting a time frame for these additional orders. It is proposed that if no final order or orders have been made for the custody and maintenance of the dependent children, for the maintenance and accommodation of the divorced wife and for the payment of *mut'ah* to her after the lapse of three months from the date of divorce, the Chief Registrar should register the divorce if he is satisfied that an interim order or orders have been made for the above ancillary reliefs. This they said would be in greater harmony with the Sharī'a and fairer to the divorced wife and children of the divorced marriage.¹²⁶

Two other amendments that affect the right to maintenance of the divorced wife occur in Sections 65 and 71 respectively. Section 65(1) of the principal Act has been amended to allow for the termination of the right of maintenance during the probation period (*'iddah*) if the divorced wife were charged with *nusyuz*. The amended version thus reads:

The right of a divorced wife to receive maintenance from her former husband under any order of Court shall cease on the expiry of *'iddah* or on the wife being *nusyuz*. (S. 65)

The second amendment relates to the right to accommodation of the divorced wife during the period of *'iddah*. A new addition has been made in the 1994 Act

126 National Council for Women's Organisations, "Memorandum on Reform of the Islamic Family Laws", p. 4.

(Section 71(2)(d)) to provide that the right to accommodation during *'iddah* ceases if the woman has been guilty of open lewdness (*fahisyah*)". These amendments have given rise to unfair allegations of *nusyuz* being made against the women during their *'iddah* period. There were cases of wives who were accused of *nusyuz* even when they had left the marital home with their husbands' permission or because of fear of physical violence and abuse.

The new addition to Section (71) is also likely to encourage false allegations of lewdness against the divorced women. Neither the original term '*fahisyah*' nor in fact its English equivalent, 'open lewdness' are precise enough to provide a reliable criterion on which to deprive a divorced wife of her right of maintenance. The law is also silent as to the kind of proof that might be necessary in order to prove the allegation of 'open lewdness'.

III. Divorce by Annulment (*Fasakh*) and the Syariah Court Environment

The Islamic Family Law 1984 enables the wife to seek dissolution of marriage by annulment. A married woman is thus "entitled to obtain an order for the dissolution of marriage or *fasakh*" on anyone of the twelve grounds that are stipulated under Section 52(1). The grounds of *fasakh* thus include:

- (a) When the husband is a missing person and his whereabouts have not been known for a period of more than one year.
- (b) The husband's failure to maintain his wife for a period of three months.
- (c) Imprisonment for a period of three years or more.

- (d) The husband's failure to fulfil his marital obligation (*nafkah batin*) for one year.
- (e) Impotence that was present at the time of marriage without the knowledge of the wife.
- (f) Insanity, or leprosy, vitilago and venereal disease for two years.
- (g) Unconsummated child marriage that is repudiated by the wife before attaining 18 years of age.
- (h) Habitual assault and cruelty of the husband and his indulgence in immoral activities or attempt to force her to lead an immoral life, and also violation of the wife's property rights.

Some discrepancy in the law pertaining to *fasakh* exist in that not all the State Enactments in Malaysia provide for the twelve grounds of *fasakh*. Three states in particular, namely, Perak, Kelantan and Kedah allow only four or five of these grounds. In Kedah wife abuse and desertion are altogether not recognised as grounds for *fasakh* divorce. Having said this, however, the grounds of *fasakh* that the law has stipulated in all the other states of Malaysia are fairly comprehensive. Even the Kuala Lumpur-based women's groups who are generally outspoken in their critique of the Sharī'a law enactments in Malaysia have recognised this. One of their members commented concerning the divorce law and said that "despite these weaknesses, Malaysia's Islamic family laws are among the most enlightened of the Muslim countries."¹²⁷ Of the various grounds of *fasakh* divorce that the law has recognised,

127 Zainah Anwar, interviewed by See Yee Ai, "Muslim Sisters' Cries of Injustice," *The Star*, Kuala Lumpur, December 10, 1998, Section 2, p. 9.

abandonment, cruelty and the husband's failure to maintain his wife are more frequently invoked than most. But women's groups have stated that "there is a caveat to *fasakh* cases," which is that women have to produce witnesses to prove that these grounds exist. Mariam Abdul, supervisor of Women's Services Centre in Petaling Jaya, has put the point succinctly in regard to cruelty litigation that "husbands usually abuse their wives in the privacy of their bedrooms, how could the wives find witnesses?"¹²⁸ Aida Melly Tan Mutalib's case is typical perhaps of the difficulties that wives encounter when initiating a divorce by *fasakh* on grounds of cruelty. Her story "reflects what many Muslim women go through." After eight years of a turbulent marriage and periodic desertion during which her husband secretly took a second wife without her knowledge, Aida, 31, separated from her husband in January 1996, hired a lawyer and filed a *fasakh* divorce case at the Selangor Syariah Court, using spousal abuse as her ground. But she was required to prove that the "beating had been going on continually during the marriage. She was also required to produce witnesses."

Her case was delayed because of these difficult requirements. Aida Melly's husband had, in the meantime filed his own case apparently without much difficulty against his wife. His was a *nusyuz* case which he filed in March 1996 claiming that she had been disobedient and demanded that she return to the matrimonial home. He managed to obtain visitation rights. However, because of the abuse report, Aida was able to get a court injunction and temporary custody of her five year old daughter, Nisha. "I told the court that I had no matrimonial home to return to," said Aida. She had filed a

128 Id.

police report when her husband took the child, then aged two, away for three days and returned her after the police intervened." Nisha came back traumatised. She wet her bed, even though she was already toilet trained and would scream when the door bell rang." The court visits wore Aida down. The court staff were unsympathetic, and then her husband would not show up, delaying proceedings further. He finally showed up when the judge threatened to have him arrested. Even then the case "proceeded at a snail's pace." On the advice of Mariam Abdul and her counsellors, Aida decided to abandon the *fasakh* case and file for a *takliq* divorce instead. The main reason for this was that the *takliq* (breach of the marriage agreement) divorce only required that the judge be satisfied that the husband has breached the marriage agreement, and Aida would not need to produce witnesses. Her argument was that her husband had failed to pay for her and her daughter's maintenance, as required in the *takliq* agreement. "I had two books of receipts of all our expenses which I had to pay for out of my own pocket," said Aida. The judge granted Aida the divorce in March 1998, after about two years of litigation. The *nusyuz* case which her husband had filed against her was thrown out. The *nusyuz* and *takliq* cases were heard simultaneously by judge Mohamad Shahri Ismail, who said that Aida's husband had not only married another woman in Kota Bharu, Kelantan, without Aida's knowledge but that in their eight years of marriage did not provide her with a proper matrimonial home although financially he was in a position to do so. The second wife, on the other hand was provided with a proper home.¹²⁹

129 Reported in *The Star* daily of Kuala Lumpur, "A Women Fights for Her Rights," December 1, 1998, Section 2, p. 10.

Fasakh divorces initiated by the wives are valid only if the husband appears at the counselling sessions and also at the trial. According to Mariam Abdul, simply by not appearing in court a husband can stymie his wife's application for a divorce. The present law requires couples seeking divorce to undergo counselling before they go to court. In order to delay the process, men often fail to turn up at these counselling sessions. Since no time frame is given for counselling sessions, cases could "drag on for months, even years."¹³⁰

Mariam Abdul who supervises Women's Services Centre in Petaling Jaya (PKW) says that her place is a refuge for many confused and frightened women. She has about 350 "charges" in her care. Some of them have been deserted by their husbands, others were physically and mentally abused. "About 99% of them have experienced problems with the Syariah Court." Norhayati Mohamad Tahir, a volunteer at PKW and Zainah Anwar of Sisters in Islam said that judges tend to treat women and men differently. When a woman initiates the divorce, there is a desperate attempt to preserve the sanctity of the marriage. The same insistence is not applied to men. Aida Melly Tan said: "At the court offices, if you are a woman, they will say "*pergi jabatan agama*" (go the religious department); if it is a man, they will ask him politely ... and advise him on form-filling. I have been there often enough to see how it works."¹³¹ Aida Melly added that women are often confronted in the Syariah Court with such comments as "*tak pandai jaga suami*" (not good at taking care of her husband) and the often-repeated advice for women to "*sabar*" (be patient) and to return to their husbands – no matter what. Mariam Abdul

130 Quoted in *The Star* daily of Kuala Lumpur article by See Yee Ai, "Muslim Sisters Cries of Injustice," December 1, 1998, Section 2, p. 9.

131 Id.

said concerning PKW's work that "people accuse us of breaking up marriages, but by the time these women come to us, their marriages are beyond salvaging. What we are telling them is to fight for their rights."

Muslim women involved in divorce litigation on the basis of *fasakh* also find the application of *nusyuz* to their detriment in that the husband can abuse the *nusyuz* provision under the current Shari'a laws. *Nusyuz* is defined under the Islamic Family Law Enactments as a situation where a wife "unreasonably refuses to obey the lawful wishes of her husband," in which case she may, subject to *hukum syara'* and confirmation by the court be denied her entitlement to maintenance.¹³² A wife commits *nusyuz* when she "withholds her association with her husband," or leaves her husband's home without his will, or when she refuses to move with him to another home or place without a valid reason.¹³³

Section 129 of the Selangor Islamic Family Law Enactment 1984 states that any woman who "wilfully disobeys any order lawfully given by her husband according to Hukum Syara'" commits an offence and shall be punished with a fine not exceeding RM100, or in the case of a second and subsequent offence, with a fine not exceeding RM500. If a husband is able to prove *nusyuz* on the part of his wife, she is not entitled to maintenance under the law. There is no provision for *nusyuz* committed by a husband, although there are provisions for ill-treatment of the wife or for failure to treat her justly under Sections 127 and 128 respectively, which make the husband liable to punishment with a fine or imprisonment or both.

132 Islamic Family Law (Federal Territories) Enactment 1984, S. 59 (2).

133 Id.

There is general acknowledgement of the limitations that the Syariah Courts are experiencing, one of which is that they are under-staffed and therefore the courts find it difficult to cope with the demands that are made of them. This is explained by *The Star* correspondent who referred to the case of a woman when she went to the Syariah Court, appealing to the judge to serve a summons on her husband to appear for their divorce hearing, the resigned judge opened a drawer, drew out a pile of unserved summonses and said "take your pick. I just do not have enough people to serve these summonses." Syariah Courts are ill-equipped and it seems that in the bigger scheme of things, family law matters are not given priority in budgetary allocations. The chronic problem of long drawn-out cases in the Syariah Courts is a result partly of such shortages. Even straightforward cases seem to drag on for months. Knowing the courts constraints, men tend to openly ignore court summonses.¹³⁴

The President of the Court of Appeal, Lamin Mohamed Yunus, when opening a two-day regional seminar on "Islamic Family Law and Women" on 16 March 1998 in Kuala Lumpur, called for a review of the Syariah Court procedures. "The present procedures should be amended to solve various problems before cases are heard in Syariah Courts. A comprehensive procedure in Islamic family law is needed to ensure it is implemented effectively." He added that some of these problems are due to "lack of lawyers and judges and the willingness of witnesses to testify," which often result in delays in court proceedings. He said that the procedures should be amended "so as to suit the current situation." Justice Lamin acknowledged that "there were reports on women's

134 *The Star* daily of Kuala Lumpur feature article, "Muslim Sisters Cries of Injustice," December 10, 1998, Section 2, p. 9

dissatisfaction about various aspects of the Islamic family law, including long process and lack of counselling."¹³⁵

One of the presenters at the Seminar, Dr. Maznah Mohamad, Chairman of the Research Committee on Muslim Women and the Law, was critical of the administration of Islamic family law and the manner of its implementation. In her paper entitled "The Discrimination in Islamic Family Law," Dr. Maznah stated that poor and uneducated women "face the most discrimination." The fact that most of these women are not aware of their rights makes it hard for them to go through the legal proceedings to begin with. And then due to financial constraints, they cannot engage lawyers to represent them. Many have to rely on the Legal Aid Bureau which not only has Sharī'a but also civil cases to deal with. Hence women "may not be properly represented." To help these women, Dr. Maznah suggested that the Islamic Religious Affairs Department set up a fund for them. She also suggested that the Legal Aid Bureau form a counselling unit to assist them.¹³⁶

The fact that there are not many Syariah lawyers, despite the increasing number of cases has also contributed to delays in the Syariah Court proceedings. While saying this, Dr. Maznah also pointed that men are usually less than willing to cooperate. For example, when the court sends a summons, not many husbands would promptly go for a counselling session. Many would only go after a warrant of arrest has been issued. But when a man wants to divorce his wife, "the legal proceeding don't take long." Since the power to pronounce

135 Izatun Hanim Shari, "Islamic Family Law Procedures Need Amendment," *New Straits Times*, 16 March 1998.

136 Quoted in Tahir Hamzah, "Know Your Rights Under Syariah Law," *The Star*, Kuala Lumpur, 18 March 1998, p. 3.

the *ṭalāq* repudiation lies with the husband "the wife can only comply, and if she knows her rights, she may ask for compensation." Dr. Maznah summarised the problems faced by Muslim women seeking divorce to include:

- Lax procedures and injustices in the administration of Islamic family law.
- Lack of proper representation by capable lawyers.
- A legal system run generally by men that is not sensitive to the problems faced by women.¹³⁷

In his paper, "Women from the Islamic Family Law Perspective," Dr. Mahmood Zuhdi Abdul Majid, Head of Universiti Malaya's Academy of Islamic Studies, pointed out that Islamic law basically emphasised "equality between men and women, especially with regard to their roles in the family." He then added that some of the problems encountered in Malaysia originate in the Sharī'a law enactments by the various states which were mainly introduced in the 1980s. "The earlier versions of the law were worse – they allowed more male domination in the family and marriage matters."¹³⁸

Turning to divorce proceedings in Syariah Courts, Dr. Zuhdi summarised them as follows: when a man wants a divorce under the Sharī'a law, he must go through the court, which will summon the wife to the court for counselling. If the wife agrees and the court finds the marriage irreconcilable, the court will then allow the husband to pronounce the *ṭalāq* declaration of divorce. However, if the wife does not want a divorce, or the court finds that the marriage still stands a chance, it will appoint the couple's relatives to help them reconcile within a period of six months. In the event of irreconcilable differences, the

137 Id.

138 Id.

necessary steps will be taken to determine the payment of an alimony for the wife, and the custody of children, as the case may be.

If a woman wants a divorce from her husband but he is against it, she can work it out by paying her husband an agreed sum. This type of divorce, known as *khul'*, is irrevocable. And lastly, a woman can also apply for *fasakh* or annulment of her marriage on one or more of the twelve grounds outlined in the Shari'a law, and these include cruelty and negligence. Any property owned in a marriage must be equally divided. It is a duty, moreover, of the Muslim man who divorces his wife to pay her an alimony. However "there are more irresponsible men out there than those who dutifully abide by this ruling."¹³⁹

Apart from what has already been said concerning suggestions for reform, this chapter may be concluded by underscoring the need for a fresh review of the divorce law under the IFL 1994. One area that calls for a review is evidently divorce that is pronounced outside the court. This should be denied recognition and registration. Such an amendment would actually mean restoring the position that was upheld under the IFL 1984. There is also a need for a review of the *fasakh* and *nusyuz* provisions and the court proceeding concerning them, especially relating to the proof by witnesses of ill-treatment and cruelty. The unruly husband who ignores the court summonses may be held in contempt of court and the Syariah Court should be granted powers to take appropriate measures concerning them. Similarly, a man who is held in contempt of court should be automatically disallowed to institute the *nusyuz* proceedings against his wife. The law may also recognise polygamy without a court order as a ground by which the wife should be entitled to ask for a judicial divorce.

139 Id.

CHAPTER SIX

Issues Over Custody and Guardianship

This chapter is presented in three sections, the first two of which address custody (*ḥaḍānah*) and guardianship (*wilāyah*) in Islamic law respectively, whereas the last section discusses issues concerning the guardianship of infants in Malaysia.

I. Child Custody (*Ḥaḍānah*) in Islamic Law

Child custody (*ḥaḍānah*) is recognised in Islamic law for the purpose mainly of care and custody of infants. It is a form of guardianship (*wilāyah*) which primarily belongs to the mother and failing her to other female relatives who are capable and willing to assume it. The question has arisen as to whether it is a right or an obligation, and if it is a right, then whose right it might be said to be? The Ḥanafis and Mālikis have considered *ḥaḍānah* to be a right of the woman to whom it belongs and she can as such waive it or disclaim it, if she wishes. According to another opinion, *ḥaḍānah* is the right of the child who is the recipient of *ḥaḍānah*, that is *al-maḥḍūn*. But it seems obvious that the three rights, namely that of the

mother, the child and the father are combined in *ḥaḍānah*. If they happen to be in harmony, each is entitled to his or her respective right, but when they are in conflict then the right of the child takes priority over the others. This would imply that if no one else can be found as a substitute, the mother can be compelled to take the custody of the infant.¹⁴⁰

The woman who acquires custody of a child must be in possession of her faculties and be able to take care of the child's physical and moral needs. A woman who suffers from disability or illness, or one whose occupation and work interferes with *ḥaḍānah* may lose her right to *ḥaḍānah*, but if her work is such that does not conflict with *ḥaḍānah*, she normally retains her right. This is the position under the Syrian and Egyptian laws in that the mere fact that a woman has a full-time job does not disqualify her from *ḥaḍānah*.¹⁴¹ The expenditures that are incurred in *ḥaḍānah*, including the provision of the necessities of life for the child may be taken out of the child's own perproperty, failing which they are payable by the father or one who is responsible for the maintenance (*nafaqah*) of the child in question. The unpaid expenditures of *ḥaḍānah* become a debt which must be paid even after the death of the party or parties involved, in which case the legal heirs will be responsible to pay it out of the estate of the deceased person.¹⁴²

The question whether or not the mother, or one who undertakes the custody of the child is entitled to charging a fee for it is a matter of disagreement among the jurists. The majority of jurists, excepting the Hanafis, maintain that no fees may be charged for *ḥaḍānah* regardless of whether it is

140 Cf. Zuhaili, *al-Fiqh al-Islami*, Vol. VII, p. 719.

141 Id., p. 726.

142 Id., VII, 736.

undertaken by the mother or another person. This is because the mother would be entitled to *nafaqah* for herself, if she is still a married woman, or when she undergoes a waiting period (*'iddah*) following a divorce. This is also said of another woman who will normally be entitled to *nafaqah* from her own father or relative. But if the child is in need of service that the mother cannot provide and she has to pay for it herself, she would be entitled to a fee. The Ḥanafis too consider *ḥaḍānah* to be an act of spiritual merit for which the mother is not entitled to a fee unless she is a divorcee who has no entitlement to *nafaqah* in which case she is entitled to a fee in addition, that is, to the *nafaqah* of the child. The fees in question are payable by the person who is responsible for the *nafaqah* of the child.¹⁴³

It thus appears that the jurists have treated *ḥaḍānah* separately from guardianship (*wilāyah*) so as to ensure that the father remains responsible for the welfare of the child during the time when the child remains in the custody of the mother. By separating the two subjects, it becomes convenient to declare *ḥaḍānah* a right primarily of the mother, and *wilāyah* a right primarily of the father. The ultimate goal is to facilitate the welfare of the child from both sides. The fact that the father remains the legal guardian (*walī*) of the child is normally meant so that the father helps with the *ḥaḍānah* and reinforces the mother's hand in undertaking it. But when this is not the case and the father abuses his role and fails to meet his responsibilities as the guardian and protector of the child, and, worst still, that he disappears completely and does not want to hear anything about it – then he should no longer be considered a guardian. The normal course to take in such

143 Id., VII, 735.

situations would simply be to strip the errant father of his right of guardianship and the Syariah Court should be authorised to transfer guardianship rights to the mother or another relative who is willing to undertake it. When the right of guardianship is abused to an extent that it becomes an instrument of inflicting harm and suffering on the mother and proves prejudicial to the child's welfare, then the court should not hesitate to put an end to it in accordance with the hadith-cum-legal maxim that "harm may neither be inflicted nor reciprocated – *lā ḍarar wa la ḍirār*." It is therefore submitted that a simple procedure should be instituted whereby the Syariah Court reviews the position of guardian either to transfer this to the person who has taken responsibility for the child's custody and welfare, or, if necessary, that the child is made a ward of the court itself.

II. Guardianship (*wilāyah*) in Islamic Law

Wilayah may be defined as the ability of a person to make decisions concerning another person regardless of the wishes or agreement of the latter. Guardianship may be of persons or property. The guardian of a person may or may not be the same as the guardian of property. It is mainly a duty incumbent on a person on grounds of kinship, by law or by court order, toward another person of imperfect or no legal capacity.¹⁴⁴ There are three grounds under the Shari'a for a person to be placed under guardianship: minority, insanity, and within limits, feminine gender. The three grounds may all combine in one person or they may exist separately. There is naturally a legitimate need for guardianship that is recognised by all legal traditions. But one

144 Cf. Zuḥailī, *al-Fiqh al-Islāmī*, Vol. VII, p. 746 ff; Nasir, *Personal Status*, p. 205; Kamali, *Law in Afghanistan*, p. 106 ff.

area of *wilāyah* in Islam in which custom rather than text has played a somewhat exaggerated role is guardianship in marriage, and I propose to look into this in some detail before I address the situation in Malaysia. for it is in this area that excesses seem to have taken place in the name of *wilāyah*. A perusal of the relevant evidence suggests that the power of constraint in marriage, known as *wilāyat al-ijbār*, has little support in the Qur'ān and Sunna and it is most likely to be rooted in social customs of the Arab society that survived and were eventually adopted by the jurists. Juristic doctrine in the Māliki, Shāfi'i and Ḥanbali schools has made consent of the guardian an essential requirement for the solemnisation of marriage of all persons except divorcees, widows and male adults. These three classes of persons must be consulted and their consent obtained by their guardians prior to solemnisation of marriage on their behalf. The Ḥanafis do not require the consent of the guardian if the ward is adult and sane, but it is required if the ward is a minor person or insane.¹⁴⁵

The debate over the validity or otherwise of guardianship is related to the different understanding of the evidence in the Qur'ān and Sunna, which is mainly concerned with guardianship in marriage, and almost all of it is open to interpretation. The jurists who consider the guardian's consent essential for marriage cite a number of passages from the Qur'ān and Sunna and we begin reviewing the Qur'ānic evidence first.

A Evidence in the Qur'ān

- (1) Do not marry unbelieving women until they believe ... nor marry the unbelieving men until they believe. (al-Baqarah, 2:221)

وَلَا تَنْكِحُوا الْمُشْرِكِينَ حَتَّى يُؤْمِنُوا... وَلَا تَنْكِحُوا الْمُشْرِكِينَ حَتَّى يُؤْمِنُوا

145 Cf. Ibn Rushd, *Bidāya*, II, 8.

- (2) O believers, when believing women come to you having migrated from their homes ... It is no sin for you to marry them when you have paid them their dowers. (al-Mumtahniah, 60:10)

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا جَاءَكُمْ الْمُؤْمِنَاتُ مِهْجَرَاتٍ فَأَمْشِرُوهُنَّ
وَلَا جُنَاحَ عَلَيْكُمْ أَنْ تَنْكِحُوهُنَّ إِذَا آتَيْنَهُنَّ أَجُورَهُنَّ

- (3) If you divorce them before you have touched them, and you had fixed for them a portion (dower), then pay half of what was fixed unless they agree to forgo it or he in whose hand is the marriage tie agrees to forgo. (al-Baqarah, 2:237)

وَإِنْ طَلَقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَرْصُفُ مَا
فَرَضْتُمْ إِلَّا أَنْ يَعْفُونَ أَوْ يَعْفُوَ الَّذِي بِيَدِهِ عُقْدَةُ النِّكَاحِ

- (4) And whoso cannot afford to marry free believing women, let him marry from the believing maids whom your right hand possess ... Marry them with the permission of their folk. (al-Nisā', 4:25)

وَمَنْ لَمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكِحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمِنْ مِمَّا مَلَكَتْ أَيْمَانُكُمْ
فَأَنْكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ فَإِنَّهُنَّ يَفْتَحِشْنَ فَعَلَيْهِنَّ نِصْفُ
مَا عَلَى الْمُحْصَنَاتِ مِنَ الْعَذَابِ

- (5) And when you have divorced women and they reach their term, do not prevent them from marrying their husbands, if it is agreed between them in kindness. (al-Baqarah, 2:232)

وَإِذَا طَلَقْتُمُ النِّسَاءَ فَلْيَبْلُغْنَ أَجَلَهُنَّ فَلَا تَعْصِلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ
إِذَا رَاضُوا بِهِنَّ بِالْمَعْرُوفِ

The words and phrases of these *āyāt* have been variously understood by the jurists. The command in the first two *āyāt* which occurs in the masculine form of the imperative, addresses men only. The second *āyah* prescribes the permission of the women's relatives. The reference in the third *āyah* to "marriage tie" implies that the power to contract marriage belongs to the women themselves or else to persons other than husbands or wives. The fourth *āyah* stipulates the permission of the women's family and relatives. The fifth *āyah* implies that the right of prevention is vested in woman's relatives. Imam al-Shāfi'i (d. 820), Ibn Ḥazm (d. 1064) and Ibn Al-'Arabi (d. 1147) argued that the injunction to contract marriage in these *āyāt* is addressed to the guardians, not to the women themselves. The fifth *āyah* has been frequently quoted by all the jurist to justify guardianship.

These inferences are, however, not convincing. To argue that the masculine form of imperative excludes women is very weak. Quite frequently such forms of address apply to male and female both. Further, even if these *āyāt* are addressed to men, they are not necessarily addressed to the guardians.¹⁴⁶

In reference to the third *āyah*, it is noted that the jurists are divided on the meaning of the phrase "in whose hand is the marriage tie;" for some it referred to the husband, for others it referred to the guardian. Ibn 'Arabi prefers the second view. He argues that after a divorce, the husband holds no marriage tie and the *āyah* could not therefore be addressed to him.¹⁴⁷ This argument may be challenged in view of the context of the *āyah*. The *āyah* is concerned with dower, not marriage, and the guardian has no right to waive the dower. The context thus

146 Cf. Khalid Masud, "Doctrine of *ijbār*," p. 223.

147 Ibn Rushd, *Bidāyah*, II, 7.

requires that it should refer to the wives themselves. Further, the phrase "in whose hand is the marriage tie" implies the power to tie and untie both. Such power belongs to the spouses, not to the guardian.

The fifth *āyah* is commonly cited, but in this case too the reasoning is quite weak. The argument that when the Qur'ān forbids guardians from obstructing women to marry should actually imply the right to obstruct is quite weak, particularly when the next phrase in the same *āyah* attributes the act of marrying to the women themselves, which implies their independent capacity to contract marriage. This is noted by Ibn Rushd who pointed out that "the conclusion that this *āyah* entitles the guardian to obstruct a proposed marriage is not sustainable by any reading of the text, neither the literal nor metaphorical. It is in fact possible to read the opposite of this meaning, which is that the guardians have no such rights concerning their wards."¹⁴⁸ Ibn Rushd then adds that the *āyah* may equally be understood to be addressing the government authorities. So those who quote this *āyah* in support of guardianship in marriage would need to explain that the address is to the guardians and not to the *ulu al-amr*. If it is concluded that the text addresses the guardians, then that understanding would also be ambiguous as there is no reference to the categories of guardians nor to their attributes and power that they may exercise. If all of this were to be intended by the Sharī'a, one would expect that it would be the subject of clear rulings of hadith by way either of *mutawātir* or something close to that. Ibn Rushd goes on to add that it is well-known that during the lifetime of the Prophet there were many people without a guardian, but no one has reported the

¹⁴⁸ Ibn Rushd, *Bidāyah*, Vol. II, p. 8.

Prophet to have acted as guardian to conclude a marriage on their behalf, nor has he, in fact, authorised others to represent him in that capacity.

The Ḥanafis who do not regard the consent of the guardian a requirement in adult marriage cite in evidence the *āyāt* in which the act of marriage is attributed to women themselves who can conclude it without the consent of the guardian. In addition to the fifth *āyah* above, they refer to the following two *āyāt*:

- And if he has divorced her, she is not lawful to him thereafter until she has married another man and he has divorced her. (al-Baqarah, 2:230)

فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ

- Those among you who die and leave behind them wives, they shall wait concerning themselves four months and ten days. When they reached the term, there is no blame on you if they dispose of themselves in a just and reasonable manner. (al-Baqarah, 2:234)

وَالَّذِينَ يَتُوفَوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا يَتَرَضَّنَ بِأَنْفُسِهِنَّ
أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَلَا جُنَاحَ عَلَيْكُمْ
فِي مَا فَعَلْنَ فِي أَنْفُسِهِنَّ بِالْمَعْرُوفِ

The act of marrying in these *āyāt* is attributed to women which implies that they may conclude their own marriage without the consent of the guardian. However, this argument too seems to be less than conclusive: To argue on the basis of the masculine or feminine form of a verb is not enough to warrant a definitive conclusion on the issue.¹⁴⁹

149 Cf. Masud, "Doctrine of *ijbar*," p. 224.

B Evidence in the Hadith

The following three hadiths are quoted by the proponents of guardianship in marriage:

1. Al-Zuhri has narrated from 'Urwah, from 'A'ishah, from the Prophet, peace be on him, who said:

Any woman who is married without the permission of her guardian, her marriage is void, void, void. If the marriage is consummated, the woman is entitled to dower because of her marriage. If they are in dispute, the ruler is guardian of those who have no guardian.¹⁵⁰

أيما امرأة نكحت بغير إذن وليها فنكاحها باطل، ثلاث مرات، وإن دخل بها فالمهر لها بما أصاب منها، فإن اشترجوا فالسلطان ولي من لا ولي له.

2. Ibn 'Abbas has reported that the Prophet peace be on him said:

لا نكاح إلا بولي.

There shall be no marriage without a guardian.¹⁵¹

3. A single person (*al-ayyim*) who had been previously married is entitled regarding herself more than her guardian. The virgin's consent regarding herself must be sought, and her silence is indicative of consent.¹⁵²

الأم أحق بنفسها من وليها، والبكر تستأمر في نفسها وإذنها سماتها.

150 Abū Dāwūd, *Sunan*, I, 284; Ibn Rushd, *Bidāyah*, II, 7.

151 Ibn Mājah, *Sunan Ibn Mājah*, p. 136; Ibn Rushd, *Bidāyah*, II, 9.

152 Muslim, *Ṣaḥīḥ Muslim*, I, 45; Ibn Rushd, *Bidāyah*, II, 7.

The first hadith which is often quoted by the proponents of guardianship has, however, been criticised by others: One of the transmitters of the hadith, al-Zuhri, has denied reporting it to Ibn Jurayj, the next transmitter. Ibn Ḥazm has however dismissed al-Zuhri's denial by making a somewhat unwarranted statement that al-Zuhri might have forgotten. Ibn Rushd has recorded a more acceptable explanation which is that al-Zuhri did not consider guardianship to be a requirement of marriage. The hadith has been further criticised on the ground that the narrator of this hadith, 'Ā'ishah, is known to have contracted the marriage of her niece Hafsaḥ without the permission of her brother who was Hafsaḥ's father and guardian.¹⁵³

The second hadith has also been technically criticised for weakness in the chain of its narration which is incomplete and does not reach back to the Prophet; it may be a statement of a Companion. This hadith has not been recorded by either al-Bukhāri or Muslim. Abu'l Faraj Ibn al-Jawzi (d. 597 H), the well-known critic of hadith, observed that though these words have been reported by other transmitters, all reports are technically defective.¹⁵⁴ A similar statement has been recorded in *al-Muwattaʿ* of Imam Malik which is attributed to 'Umar b. al-Khaṭṭāb, not to the Prophet.¹⁵⁵ In addition to these technical objections, the Ḥanafis have considered it contradictory to the Prophet's own practice.¹⁵⁶

The Ḥanafis have held concerning the third hadith that it exempts the divorcees and widows from the requirement of guardianship. Ibn Humām (d. 1457 C.E) and al-Zurqāni (d. 1687 C.E) argue that the term "*ayyim*" in this hadith applies to

153 Zayla'i, *Naṣḥ al-Rāya*, p. 185; Ibn Rushd, *Bidāyah*, II, 9.

154 Id., p. 188.

155 Mālik, *al-Muwattaʿ*, Vol. IV, p. 8; Masud, "Doctrine of *Ijbār*," p. 225.

156 Sarakhsi, *al-Mabrūf*, Vol. V, p. 10.

all unmarried persons, male, female, virgin, widows and divorcees, all of whom have a superior right to conclude their own marriage, and also to manage their own affairs. The Shāfi'i and Māliki scholars argue that the phrase "she has a greater right than the guardian" clearly indicates that both share this right.

Joseph Schacht has argued that in pre-Islamic Arabia, marriage without a guardian was the norm and that the requirement of marriage guardian was introduced during the Umayyads in the second century, probably not later than 'Umar b. 'Abd al-'Aziz (d. 721 C.E). He concluded that the statement "there shall be no marriage without a guardian" in later periods appeared as a saying of the Prophet.¹⁵⁷

Ibn Rushd (d. 1198 C.E) whose *Bidāyat al-Mujtahid* on comparative *fiqh* is designed to explain and ascertain conflicts of law concludes his analysis with the following remarks:

The cause of their disagreement is that there is no text in the Qur'ān nor in the Sunna of the Prophet which clearly indicates guardianship as a prerequisite of marriage, let alone any clear text (*naṣṣ*) on the point. Rather the *āyāt* and the *ahādīth* that are cited by the proponents of guardianship are ambiguous, and so are the *āyāt* and *ahādīth* that are cited by their opponents. These latter hadiths, although clear in respect of meaning are of questionable authenticity.¹⁵⁸

Ibn Rushd has further observed that even the rational justification given by both sides is less than satisfactory. In view of the frequency of cases referred to the Prophet and the evident importance of the matter, one would expect that the Prophet would have clearly spelled out the qualifications and categories of guardians and terms for the valid exercise of their powers. He

157 Schacht, *Origins*, p. 183.

158 Ibn Rushd, *Bidāyah*, Vol. II, p. 7.

then concludes that guardianship is not a legal requirement of a valid marriage but may be assigned a supervisory role to ensure due consideration and care for the interests of the ward.¹⁵⁹

III. Guardianship of Infants Under Malaysian Law

An issue which became the focus of attention by the women's groups and the media in Malaysia in 1998 was whether Muslim women should be entitled to guardianship of the infants under their custody. A woman under the present law is entitled to the custody (*hadānah*) of young children but not to their guardianship. One of the consequences of this is that a woman who might have been separated or divorced is still not the legal guardian of her young son or daughter. A difficulty thus arises with regard to the application for passport, or school registration for minors, which at present requires the father's signature in the case of both Muslims and non-Muslims. If the father has signed the original registration form for the first school, the transfer document to a new school, in the event the mother moves to a new location after a divorce, still requires the signature of the father. Other official transactions which require the signature of the legal guardian also refer to the father's signature. The mother can thus have custody of her child but the Immigration Department requires the father's signature when a minor applies for a passport. Similarly, the Guardianship of Infants Act 1961 only allowed the father to apply for the birth certificate of the child. Divorced mothers have consequently experienced difficulty in being able to take their young children with them abroad and many have reportedly missed out on educational opportunities as a result. Single mothers also face

159 Id., Vol. II, p. 8.

the problem of tracking down errant husbands just to get their signature on the relevant application forms when children need to apply for identity cards. "There have been cases where the fathers could not be located, particularly when the parents had been divorced or separated." This was stated by the Malaysian Chinese Association Deputy Chairman, Dr. Tan Yee Kew who also said that "the existing Act had caused a lot of inconvenience for mothers who wanted to apply for passports for their children." Although the Immigration Department had introduced a special form enabling single mothers to apply for passports on behalf of their children, she said that "in principle, women were still being treated as the lesser parent under the present Act."¹⁶⁰

Women's groups have "received complaints from married women who are not allowed to sign the application for their children's passports." These women feel particularly anguished as in many instances they are working mothers who contribute equally to the financial maintenance of their children. In some cases they earn more than their husbands and also contribute more to the family budget, yet they are not entitled to sign their children's legal documents.¹⁶¹

Women's groups have said that they have raised this issue over a period of years and argued the case for an amendment to the Infant Guardianship act 1961 to grant equal parental rights to mothers to be legal guardians of their children, and it now seems that the proposed amendments are on the Parliament's agenda for deliberation in the Dewan Rakyat (Lower House). The proposed amendments, however, apply

160 Quoted in *The Star* daily of Kuala Lumpur feature article "Right to Apply," 17.8.1998.

161 Letter to the Prime Minister Dr. Mahathir by representative of seven women groups, dated 18 December 1998, p. 2.

only to non-Muslims but Muslim women's groups have demanded that they should be extended to Muslims as well. The National Unity and Social Development Minister, Zaleha Ismael, informed the Dewan Rakyat in April 1997 that the Women's Affairs Division at the Prime Minister's Department was working with the Attorney-General's Office and other women's organisations to review the Act. In August 1998 Zaleha Ismael announced that the Attorney-General's Office had completed the draft of the proposed Amendment Bill and that the amendment was ready to be tabled before Parliament.¹⁶² The Minister did not, however, confirm as to whether the Amendment Bill entitled Muslim mothers to the same rights as those of their non-Muslim counterparts. Ivy N. Josiah, Executive Secretary to the Women's Aid Organisation of Malaysia urged that the law should grant equal guardianship rights to both the parents and "we anticipate that the proposed amendment recognise the mothers to be full guardians." Josiah added that "women's groups felt that the Act discriminated against women which is why they lobbied for about a decade that both parents be accorded equal rights as guardians."¹⁶³

In a three-page letter to the Prime Minister, Dr. Mahathir, dated 18 December 1998 and signed by representatives of seven women groups, the signatories urged that "Muslim women of this country must also benefit from the growing sphere of rights of citizenship accorded to their non-Muslim sisters ... Are Muslim women expected to turn over and play dead while their non-Muslim sisters are accorded the right to be treated as equal to men?"¹⁶⁴

162 Reported in *The Star* daily of Kuala Lumpur on 17.8.1998.

163 Id.

164 I would like to thank Zainah Anwar, Sisters in Islam Co-ordinator, for providing me with a complimentary copy of this letter.

If Muslim parents are divorced or separated and custody is granted to the mother, she will have to show the court order granting her custody before the child's passport application can be approved. The divorce papers alone are not enough. But contentious divorce litigation takes time and even when the Muslim couple are divorced, there may still be problems over custody, which may not have yet been heard nor decided. "Even trying to get dates fixed for hearing can be a problems."¹⁶⁵

Aida Melly Tan Mutalib's case may be given as an example. This young woman of 31 years of age, an editorial assistant, had problems with her marriage for many years and her plea for a judicial separation (*fasakh*) on the basis of cruelty and abuse did not succeed, due to her inability to provide witnesses to prove her claim. She had to then file for a *takliq* divorce and invoke her marriage agreement clause on account of her husband's failure to provide her with maintenance. A divorce by *fasakh* was eventually granted in March 1998, but she had not received her divorce papers until December that year. She was consequently unable even to apply for the custody of her five-year old daughter, let alone have the custody papers ready at hand to apply for a passport on her behalf. The reason for this delay was that her ex-husband had appealed against the *cerai takliq* (divorce for violation of conditions in the marriage certificate). Aida was therefore still waiting for a date for the appeal to be heard in the Syariah High Court. She said in a newspaper interview that "In case I want to take my daughter for a holiday overseas, I will not be able to apply for a passport for her without my ex-husband's signature ... I

165 Muharyani Othman, "Include Muslim Mums Too," *New Straits Times* of Kuala Lumpur feature article, November 19, 1998, Life & Times Section, p. 1.

therefore strongly support the proposal that the amendment to the Infant Guardianship Act be extended to Muslim women ... This is a case of discrimination against women which must be brought to an end."¹⁶⁶

This situation has not been helped by the 1994 amendments of IFL 1994. A divorce under the IFL (Federal Territory) Act 1984 would only be registered after the court had made order for custody and maintenance of the children and the divorced wife. However, with the subsequent amendment of that law in 1984, the court can now approve of a *ṭalāq* divorce provided that it is satisfied that such a divorce is valid according to *hukum syarak*. A *ṭalāq* pronouncement is thus valid when it is uttered by a person who is in possession of his normal faculties and do so in the presence of two witnesses. The 1994 amendment has thus separated the *ṭalāq* proceedings from that of custody, which is precisely what has happened in Aida's case.

Women's groups have also expressed the concern that if the proposed amendments to the Guardianship Act only apply to non-Muslim women, such action would in the long run produce a sector of third class citizens of oppressed Muslim women who are unable to realise their full potential and unable to contribute fully to the well-being of the family. According to Sisters in Islam "Muslim women are discriminated against because laws and policies are informed by the belief that Muslim women are not equal to Muslim men, and Muslim women are not equal to non-Muslim women."¹⁶⁷ This was said to be contrary to the Government's official commitment to equality between men and women. Moreover "Islam recognises equality between the two sexes."¹⁶⁸

166 Id.

167 Id.

168 Id.

The Islamic Family Law (Federal Territory) Act 1984 deals with custody and guardianship in part VII (Sections 81 to 108) and provides considerable details on both custody and guardianship. Section (81) thus provides that "the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution." In the event where the court is of opinion that the mother is disqualified "under *hukum syara'*" to exercise the right of custody, then custody passes on, in an order of preference, as the act has spelled out, firstly to the maternal grandmother, then the father, the paternal grand-mother, the full sister, the uterine sister, and a member of other relatives (twelve categories are mentioned in the Act) who are mainly female relatives. Female relatives clearly take priority in the matter of *hadanah* over male relatives so much so that the list of twelve relatives contains only one male, that is the father, and the rest are all females. This part of the IFL is based entirely on the accepted rules of *fiqh* on the subject of *hadānah* and the leading schools of *fiqh* are generally in agreement on it. Custody according to section (84) of the IFL terminates in the case of boys upon attaining the age of seven years and in the case of girls, upon completion of nine years of age, after which the right of custody devolves upon the father, but if the child "has reached the age of discernment (*mumayyiz*) he or she shall have the choice of living with either of the parents, unless the court otherwise orders." The age of discernment can be any age between seven and fifteen years, depending on the intellectual capacity of the individual child and his or her ability to make a reasonable choice.

All of this seems quite reasonable and the underlying concern here is the child's need for affection and care and the superior standing of the mother and other female relatives to respond to those needs. The father and other male relatives are

not necessarily precluded from the ability to give love and attention to the young children, but the likelihood that they may have occupations outside the home and be the breadwinner of the family and so on tilts the scales in favour of the mother and female relatives.

But then the IFL 1984 stipulates on the subject of guardianship (*wilāya*) under section (88) that "although the right to *ḥaḍānah* or custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child." When the father dies, legal guardianship devolves upon the following relatives: (a) the father's father; (b) the executor appointed by the father's will; (c) the father's executor's executor; (d) the father's father's executor; (e) the father's father's executor's executor (section 88.1). The first provision to proclaim the father as the primary guardian is justified albeit with some reservation, but it is questionable whether giving priority to this long list of executors over the mother and custodian of the child is in line with the conditions of contemporary society, or the best interests of the child.

This rather imitationist and *taglīd* – oriented mentality is not helped by the prevailing attitudes in the government departments of unquestioning receptiveness of the ulema views. "When the Attorney General's chambers receive a draft of a proposed Syariah law" as one commentator pointed out, "they dare not dot an 'i' or cross a 't,' even if it is against the constitution or existing policies. The minute one of the ulema makes a pronouncement, it becomes gospel law. There can be no other opinions." It was then added that such blind acceptance is not characteristic of Islam which has entertained various views within the religion ever since its advent in the seventh century.¹⁶⁹

169 Zainah Anwar's interview with See Yee Ai, "Muslim Sisters Cries of Injustice," *The Star*, Kuala Lumpur, December 10, 1998, Section 2, p. 9.

The awareness that *ḥaḍānah* is a form of *wilāyah* is present in the IFL 84 where part VII is entitled "Guardianship" and *ḥaḍānah* appears immediately as the first sub-heading under that title. The two sub-headings that are dealt with in part VII clearly remain undigested and stand at odds: Instead of seeing custody and guardianship as complementary and natural continuity of one another, as they should be, the Act gives the impression that *ḥaḍānah* is a legal anomaly. If the mother can be trusted with the upbringing of the child up to seven or nine years, is she not "the primary natural guardian" of the child? To say that "the father shall be the primary natural guardian of the person and property of the minor child" without qualifying this to preclude the errant father who is more of a problem than a help is less than justified. The unqualified terms of this Act also tend to sound superficial and oblivious of the facts of the matter in that it ignores the most formative years of the child's life. The phrase "minor child" is also vague as it tends to include the years when the child might have been in the custody of the mother. Those aspects of both the IFL 1984 and their underlying *fiqh* provisions clearly bear the vestiges of patriarchal values and tribalist interests of medieval society. Given the realities of contemporary life, often the mother and father are both bread-winners and responsible for the child's maintenance and education. In cases of divorce, even though fathers are ordered to pay maintenance, it is the common complaint of single mothers that fathers persistently fail to do so. It is also rare that the father's father, brother or uncle would assume responsibility for maintaining the children of errant father. It has been said, and rightly so, that if the father has failed to fulfil his duties as a guardian, then there is no reason why he should retain his right to legal guardianship.¹⁷⁰

170 Id.

The IFL 1984 stipulated in section (83) that the mother loses her right of custody if she leads an immoral life, neglects or is cruel to the child. Yet this law is silent to make a similar a stipulation regarding the father's right of legal guardianship. It may be said that the IFL has in this connection failed to even follow the rules of *fiqh* on guardianship. For under the *fiqh* rules the guardian loses his right if he deliberately abuses his power and harms the child as a result, in which case the court acquires the right to exercise the powers of the guardian.

Mahmood Zuhdi Abdul Majid is of the view that it is not necessary to extend the proposed amendments of the Infant Guardianship Act to Muslim women as he thinks it is only a matter of interpretation and suggests that the IFL provisions on "*ḥadānah* should be extended or made clearer to cover both custody and guardianship."¹⁷¹ This view is, however, oblivious of the fact that the IFL 1984 (s. 88, quoted above) draws a clear distinction between *ḥadānah* and guardianship, and lays down long lists of who is entitled to *ḥadānah* or to guardianship respectively. Interpretation cannot therefore overrule the text, which clearly treats *ḥadānah* and *wilāyah* separately.

The National Council of Women's Organisations has proposed that the law should be amended so that:

- Mothers and fathers should have the same rights and authority in the matter of guardianship.
- Upon the death of the father, the mother should be the guardian of the infant, either alone or jointly with the guardian appointed by the father. The court should determine the roles and conditions of joint guardianship.

171 Id.

- The court should enforce payments from such incomes as pension or social security benefits to the gaurdian for the upkeep of the child.¹⁷²

In their letter of 18 December 1998 to the Prime Minister, Dr. Mahathir, representatives from seven women groups¹⁷³ have proposed a two-step action plan. First, an immediate measure for the Cabinet to issue an administrative directive to government departments to amend all official forms and legal documents which require the signature of the legal guardian, irrespective of religious origin, to include the words "signature of mother, father, or legal guardian." Second, a longer term measure to amend the Islamic Family Law/Enactments to give women equal right to guardianship, and to provide that whoever has the custody of the child should also be recognised as the legal guardian of that child.

The two-step plan takes into consideration the fact that since every state in Malaysia has separate jurisdiction relating to Islamic religious matters, it is usually difficult to ensure that amendment will be carried out in all of their respective Enactments. They tend to vary in their orientation to issues and there is little assurance as to the length of time it might take for the reforms to materialise, and no guarantee still whether all the thirteen states and the federal territories will abide by any model statute that might be adopted. The faster approach of issuing a government directive is therefore recommended, while the more substantive amendments to the

172 *Id.*

173 These groups are Sisters in Islam (SIS), National Council of Women's Organisations (NCWO), All Women's Action Group (AWAM), Association of Women Lawyers (AWL), Pusat Khidmat Wanita Pertiwi (PKW), Women's Aid Organisation (WAO), and Women's Crisis Centre (WCC).

relevant laws are pursued in the meantime. To this is added the argument that applications for identity cards, passports and school registration are civil matters and do not normally fall under the Sharī'a law, and therefore the concern over any conflict of jurisdiction does not arise. Anyone who has physical custody of children should be allowed to sign these official documents. The Muslim mother should be given the right to act in the best interest of her child in these civil matters.

CHAPTER SEVEN

The Hudud Bill Debate

One of the major events of the 1990s that merits attention in discussing Sharī'a-related developments in Malaysia is the Kelantan Sharī'a Criminal Code (II) Bill, known as the Hudud Bill, which was passed in November 1993 by the State Legislative Assembly of Kelantan.¹⁷⁴ The Bill has, however, become controversial and remained in abeyance ever since for want of approval by the Federal Government. This is due to the fact that the Bill imposes a structure of punishments which exceed the jurisdictional limits of the Syariah courts under the constitutional specifications of the State List. The Syariah courts have limited jurisdiction in criminal matters under federal law and can only deal with offences punishable with imprisonment up to three years or a fine not exceeding RM5000 or caning up to six strokes. It has also been argued that a constitutional amendment would be needed to create the necessary jurisdiction and it would require two-thirds majority in Parliament, making it necessary

174 Actual plans for the introduction of this Bill were announced by the State government earlier in 1991 and the debate over it also started as of that time.

for UMNO to enlist the support of its non-Muslim coalition partners, which would be very difficult to obtain. The Islamic party of Malaysia, PAS, which is the ruling party of Kelantan, under the leadership of its enigmatic leader and Chief Minister, Nik Aziz, has protested over the delay in the enforcement of the Hudud Bill, which has to date been met with an equally resolute response from the Federal Government, especially the Prime Minister, Dr. Mahathir Mohamad, who has taken the centre stage in the debate that became a familiar media topic in recent years. The issue over the Hudud Bill has remained unresolved as of this writing, but the debate has brought the wider subject of the applicability of Sharī'a in Malaysia into sharp relief. Many writers and public figures have spoken over the various aspects of the Hudud Bill and the prospects generally of the Islamisation of law and government in Malaysia. This debate is unusually candid since the parties involved therein include not only the public and the media, but the state and federal governments whose leaders are called upon to clarify their positions, often in response to particular developments.

The Hudud Bill itself consists of (72) clauses and five supplementary schedules, divided into six parts, namely *hudūd* (prescribed) offences, *qisās* (just retaliation), evidence, implementation of punishments, general provisions, and (Sharī'a) court proceedings. The *hudūd* offences in part one also appear under the six headings of theft, highway robbery (*hirāba*) unlawful carnal intercourse (*zinā*), *qadhif*, that is, slanderous accusation of *zinā* which is not proven by four witnesses, wine-drinking (*shurb*) and apostasy (*irtidād*). The structure of the punishments that the Bill has introduced and the detailed manner of their implementation read like a reproduction of the all too familiar textbooks of classical *fiqh* on the subject. Commentators have, in fact, stated that the

Hudud Bill has adopted the renowned Shāfi'i jurist Abul Hasan al-Māwardi's (d. 450 H) *Kitāb al-Ahkām al-Sultāniyya*, and merely changed its style into a statute book format. Thus the Bill has incorporated punishments ranging from the mutilation of the hand for the capital offence of theft, lapidarian for a proven offence of *zinā*, death punishment for *hirāba*, and flogging for wine-drinking (*shurb*) and slanderous accusation, or *qadhf*, without actually taking into account the realities of contemporary society in Malaysia. PAS has maintained the view that Muslims have no choice but to accept the proposed legislation: They cannot pick and choose what they consider reasonable and leave out the rest. Muslims who question the *hudūd* were told that they were merely ill-informed and influenced by the liberal secular West, which regards such laws to be barbaric. Any doubts concerning the introduction of *hudūd* that are expressed are put down to lack of understanding, even ignorance, on the part of others. The PAS leaders have hardly, if ever, raised the question as to whether there might be a case that they too should make adjustments and move away, perhaps, from their undiluted *taqlīdī* attitude and take the prevailing conditions of society into consideration. Six years elapsed since the introduction of the Hudud Bill during which the PAS-led government has not changed its typical posture concerning the said Bill. Note, for example, the announcement in mid-February 1998 bearing the title "Kelantan to Explain Hudud Laws," (*Sun* daily, Kuala Lumpur, 11 February 1998) where the Chief Minister Nik Aziz is quoted to have said that his administration "is intensifying efforts to disseminate information on *hudūd* law to expedite its imlementation in the state." He added that this is "urgently required as it can help solve many problems that other laws are unable to solve." These include, he said "economic matters and social ills which burden society." The

Chief Minister has thus made clear that all he needed to do is "to explain *hudūd* laws" not that he would need to look at the society around him or to consider even the possibility that the implementation of *hudūd* may prove unfeasible and problematic, and learn, for instance, from the experience of Pakistan. The *hudūd* experience in Pakistan has clearly been less than successful, partly due to the equally dogmatic approach taken toward the subject by the late General Zia. The issues need to be looked at from different angles and any decision that is taken needs to be harmonious with the dictates of reality and wisdom. The PAS leaders have repeatedly said that Malaysians of other faiths should neither be fearful nor suspicious of the *hudūd* because Malaysians are by-and-large law-abiding, family loving and religious. Because of this, all Malaysians will eventually accept the *hudūd* as they are meant to protect their lives and properties and enhance their peace of mind. To this, it is added that the prisons are over-crowded and financially burdensome. Enforcement of the *hudūd* would drastically reduce these problems because once an individual is tried, convicted and punished, he or she is released. The PAS government has moreover stated that under the *hudūd* administration, reform and rehabilitation programmes will be made available for the convicts.¹⁷⁵ The Kelantan authorities have been active in some other areas too, introducing, for example, the Sharī'a law of evidence, and several municipal by-laws designed to facilitate a general enforcement of the Sharī'a.

PAS has evidently demanded a total implementation of the Sharī'a, a demand which, as one observer noted, is difficult to refuse "because it involves basic faith and has an emotional appeal which can grow out of hand".¹⁷⁶ This aspect of the

175 Cf. Rose Isma'il ed. *Hudud in Malaysia, The Issues at Stake*, pp. 51-52.

176 Razaleigh Hamzah, Opening Speech to the Semangat 46 Seminar of October 17, 1993, in Rose Ismail, ed., *Hudud in Malaysia*, p. 57.

Hudūd Bill scenario has been evident as from the outset and began on that note in so far as the proponents of the Bill saw their act as a religious duty and a dogmatic initiative rather than a response to the dictates of law and justice in society. In his initial announcement in November 1993 in which he informed the public of the ratification of the Bill by the State Assembly, the Chief Minister of Kelantan went on record to explain the committee work and participation of the ulema in the drafting of the Bill and then added that the State Government was "performing a duty required by Islam", and "failure to act in this regard would be a great sin".¹⁷⁷ As to the question whether the people had accepted the state government's plan to implement the *hudūd* laws, the Deputy Chief Minister (Abdul Halim) made the remarkable announcement that "the question did not arise as Muslims in the State who rejected the laws would be considered *murtad* (apostate)".¹⁷⁸

Razaleigh Hamzah criticized the dogmatic approach of the Kelantan government in saying that "the implementation of Islamic law must not be considered solely for its implementation aspect, but how the law can solve the problems of today's society".¹⁷⁹ Referring to the PAS totalitarian demand, Razaleigh Hamzah added that "there are many obstacles in complying with this demand", and then suggested that the implementation of Islamic law in Malaysia should be determined by democratic means. The Muslims of Malaysia should decide "as to who should have the mandate to implement the teachings of Islam". Can Islamic law be

177 Quoted in M.H. Kamali, *Punishment in Islamic Law*, p. 8.

178 *Id.*, p. 8.

179 Razaleigh Hamzah's speech quoted in Rose Ismail, ed., *Hudūd in Malaysia*, p. 59.

implemented and "function effectively in a country in which the system of government is not based on the philosophy and the teachings of Islam"?¹⁸⁰

The general tenor of the critique that the federal government has advanced of the Hudud Bill is similar to that of Razaleigh Hamzah's and it is basically over the prospects of attaining justice. They have voiced the fear that in the event where the *hudūd* are applied only in a part of Malaysia and as an isolated case from the rest of the Sharī'a, they may fail to achieve justice.

Prime Minister, Dr. Mahathir stated the position of his government most explicitly when he said that "the Government would not sit back and allow PAS to commit cruel acts against the people in Kelantan, including chopping off the hands of criminals". The Prime Minister added that "the Government would take action against the PAS-led Kelantan Government if it implemented the Pas-created *Hudūd* laws". Dr. Mahathir elaborated that the *Hudūd* Bill amounted to discrimination against Muslims in cases, for example, when two people, a Muslim and non-Muslim, committed a crime, only the former is subjected to a heavy punishment but the latter is not. The PAS version of the *Hudūd* law "punishes victims while actual criminals were often let off with minimum punishment; this is against the Islamic spirit of justice"; and therefore "against the true teachings of Islam".¹⁸¹

In his 1996 publications, *the Asian Renaissance*, the then Deputy Prime Minister of Malaysia, Anwar Ibrahim, spoke explicitly on the *hudūd* issue. In an attempt to read this issue in the general context of Southeast Asian Islam, Anwar Ibrahim

180 Id., p. 58.

181 Dr. Mahathir's Speech "We Will Not Allow PAS to Commit Cruel Acts", *New Straits Times*, 10 September 1994, pp. 1-2.

wrote that "the proponents of the imposition of Muslim laws or the establishment of an Islamic state are confined to the periphery". Southeast Asian Muslims prefer to concentrate on economic growth and eradication of poverty "instead of amputating the limbs of thieves". They do not believe it would make one less of a Muslim to promote economic growth, to master the information revolution and ensure justice for women.¹⁸² With reference again to the *hudūd*, Anwar Ibrahim added that he is supportive of Yusuf al-Qaradawi's advocacy for *fiqh al-awlawiyyāt*, the understanding of the priorities of Islamic law, and wrote that "the application of the *hudūd* ... is not necessarily among the top priorities of contemporary Muslim societies".¹⁸³ Many issues have been raised over the detailed provisions of the *Hudūd* Bill, which I have elsewhere discussed in detail, but I now turn to a Sharī'a-based critique of the *Hudūd* Bill.¹⁸⁴

A Juridical Analysis of the *Hudūd* Bill

The quest to find *ijtihād*-oriented solutions to the *hudūd*-related issues in modern times would need to reflect on a number of points concerning not only a fresh approach to interpretation of the source evidence but also matters relating to a Sharī'a-oriented policy (*siyāsa shar'īyya*),¹⁸⁵ the basic concept of *ḥadd* in the sense of a fixed mandatory penalty, and considerations, above all, of equality and justice.

The rules of Islamic jurisprudence are clear on the point that interpretation and *ijtihād* has no place in the face of a clear

182 Anwar Ibrahim, *The Asian Renaissance*, p. 114.

183 *Id.* P. 119.

184 For further details see Kamali, *Punishment in Islamic Law: An Enquiry into the Hudud Bill of Kelantan*.

185 For details on this see Kamali, "Siyāsa Shar'īyyah or the policies of Islamic Government," as listed in the bibliography.

text (*naṣṣ*). The question here is, however, a more foundational one, which is concerned with the understanding of the *naṣṣ* itself. What is submitted here is that conventional attitudes toward the understanding of the *āyāt* of the Qur'ān in which fixed penalties occur in reference to specified offences have focused only on a portion of the *nuṣūṣ* and by choosing to do so neglected the Qur'ānic provisions on rehabilitation and repentance, which are integral to the *nuṣūṣ* in question, but which have almost been totally ignored. When this is admitted to be the case, as I shall presently show that it is, then the methodological ruling that *ijtihād* has no place in the face of a clear *naṣṣ* does not apply until the *naṣṣ* itself is clearly known and understood. I shall take up each of these points separately as follows.

The Qur'ān has laid down specific punishments for four offences, namely theft, adultery, slanderous accusation (*qadhf*) and highway robbery (*ḥirābah*). This by itself is evidence enough to preclude the two other offences, namely *shurb* (wine-drinking) and apostasy (*ridḍa*) from the purview of *ḥudūd*. For *ḥadd* by definition is an offence for which the text prescribes a punishment and the Qur'ān specifies no punishment for these two offences. The question may be asked as to why did the Hudud Bill of Kelantan extend the scope of the *ḥudūd* from four to six offences in the face of clear evidence that would justify their confinement to four? This is, however, an incidental although a relevant point – our main point here is concerned with the fact that on virtually every one of the four instances where the Qur'ān specifies a punishment for an offence, there is also a provision on repentance, forgiveness and reformation. This is not an incidental but a consistent feature of the Qur'ānic evidence so much so that any reading of the text which isolates its provisions on repentance is bound to be deficient. But this is precisely the point: juristic

expositions of the *hudūd* have relegated to insignificance the Qur'ānic references to repentance. Our argument here is that the Qur'ān has prescribed a fixed punishment for these offences, which are, however, not mandatory, simply because all provisions on fixed punishment are immediately followed by provisions on repentance in every case, and this cannot combine the idea of mandatory enforcement.

We note a dual emphasis in the Qur'ān in relationship to *hudūd*, one of which is on punishment and the other on repentance, but the conventional *fiqh*, as well as the *Hudūd* Bill of Kelantan, have upheld the first and ignored the second. This is presumably because the *hudūd* were somehow perceived to be mandatory leaving the judge with little discretion but to enforce them once they are proven by valid evidence. It is submitted that taking this position entailed a departure from the Qur'ānic vision on *hudūd* concerning rehabilitation and repentance. We now briefly address each of the four *hudūd* crimes separately as follows:

1. Theft (*Sariqah*)

The Qur'ān provides concerning the punishment of theft:

As to the thief, male or female, cut off his or her hand as retribution for their deeds and exemplary punishment from God. And God is exalted in power, Most Wise. But if the thief repents after his crime and amends his conduct, God redeems him. God is forgiving, Most Merciful. (al-Mā'idah, 5:38-39)

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ
وَاللَّهُ عَزِيزٌ حَكِيمٌ ﴿٣٨﴾ فَمَنْ تَابَ مِنْ بَعْدِ ظُلْمِهِ وَأَصْلَحَ
فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ إِنَّ اللَّهَ عَفُورٌ رَحِيمٌ .

The *Hudūd* Bill defines theft as "an act of removing by stealth a moveable property from the custody or possession of its owner without his consent and with the intention to deprive him" (Clause 5). The next clause makes the offender liable to a three-fold punishment as follows:

- (a) for the first offence the amputation of his right hand;
- (b) for the second offence with amputation of part of his left foot; and
- (c) for the third and subsequent offences with imprisonment for such term as in the opinion of the court may likely to lead him to repentance. (Clause 6)

The Bill then provides a 15-item list, under clause (7), of the mitigating circumstances wherein the capital punishment of theft shall not apply but the court may impose a lesser punishment. These circumstances specify the minimum monetary value of the stolen goods, the standards of proof, whether the owner has taken proper care to guard against theft, and whether the offence is committed within the family, among partners, or in stressful circumstances of starvation and hunger and so forth.

The Bill has clearly opted for the most unforgiving and severe stance concerning the second offence of theft, which is punishable by amputation of a part of the left foot "in the middle of the foot in such a way that the heel may still be usable for walking and standing" (Caluses 6 and 52). The scholastic *fiqh* has admittedly validated the second amputation but it has been disputed, for the simple reason that the Qur'ān has not validated it. Two prominent Companions, Ibn 'Abbās and 'Aṭā', are reported to have held that no further amputation is valid for the second and subsequent theft, and supported this by citing the Qur'ānic text "And your Lord is

never forgetful" (Maryam, 19:64). Ibn Hazm has strongly criticised the majority ruling here and expressed consternation that such drastic positions are taken without there being any evidence in the sources to support them.¹⁸⁶ El-Awa's enquiry into this has also led him to the conclusion that the minority view on this is "nearest to the spirit of Islamic law."¹⁸⁷ There is clear guidance in the Sunna to the effect that in matters of punishment, the ruler and judge should adopt the course that is inclined toward leniency, not toward severity and hardship. This naturally gives rise to the question as to why did the drafters of the Hudud Bill take the harsher of the two available positions.¹⁸⁸

Furthermore, while the first part of the above text prescribes a punishment, the latter portion thereof moderates that position by opening the door to repentance to one who repents and takes measures to amend his conduct, and the text ends by the affirmation that God is merciful and forgiving. The reference to repentance in the text which occurs in the phrase '*faman tāba*' (one who repents) is immediately followed by the phrase "*wa aṣḥaba*" (reforms himself). The language of the text clearly conveys the understanding that punishment should not be hastily enforced, nor should it be enforced regardless of the inclination and willingness of the offender to reform himself. Reformation and repentance naturally takes time and come as a result of enlightenment and education. The convict should not only be given time in which to reflect and repent but also that this should be facilitated, on a selective basis at least, by positive incentives. Now to maintain the view that the

186 Ibn Hazm, *al-Muḥalla*, Beirut edn. Edited by al-Bandari, Vol. XII, p. 62.

187 El-Awa, *Punishment in Islamic Law*, p. 6.

188 This present analysis basically summarises the argument I have advanced in my book, *Punishment in Islamic Law: An Enquiry into the Hudud Bill of Kelantan*, Kuala Lumpur, 1995.

Qur'ānic punishment here is fixed and mandatory is equivalent to turning a blind eye to a portion of the text which is integral to its intention and purpose, and this is basically the position which has prevailed in the established doctrine of the *madhāhib*, and then followed in the *Hudūd* Bill of Kelantan.

A point may also be made as to the implication of the words "*al-sāriq wa'l-sāriqa*" (male and female thieves) in that these are adjectives, not verbs, and adjectives do not materialise in a person without a measure of repetition. A person is not, for instance, described as 'generous', 'honest' or 'liar,' merely by a single act of generosity, honesty or lying. These adjectives carry their full meanings when there is recurrence and repetition. Since the text here uses 'thief' as an adjective, it may be said that the punishment it has devised should apply to recidivists but not to first time offenders.¹⁸⁹ This is yet another consideration in the understanding of the text under review which has not been taken into account in the conventional hermeneutics of this text. Abu Zahrah has cited, in this connection, the incident which occurred during the time of the second Caliph 'Umar b. al-Khaṭṭāb. A young offender was charged with theft and the charge was proven, but before the punishment was carried out, the mother of the convict asked the Caliph: "Pardon him O Commander of the Faithful, for it was his first time." The Caliph granted the plea and said "God is too merciful to reveal the nakedness of his servant for his first failure."¹⁹⁰

Two other Qur'ānic *āyāt* need to be reviewed on the subject of repentance, one of which declares that "Repentance with God is only for those who do evil in ignorance, then turn to Him soon. It is to these that God turns with mercy." (*al-Nisā'*, 4:17) This clearly means that the Qur'ān opens the door of repentance, not to recidivists and hardened criminals, but to

189 Cf. Abu Zahrah, *al-Uqūbah*, p. 134-136.

190 Id.

those who fall in error and are subsequently inclined to reform themselves. But the broader and more encouraging tone of the Qur'ān on the subject of repentance is conveyed in the text where it is declared that "God loves those who turn to Him in repentance and who are willing to purify themselves." (al-Baqarah, 2:222)

إِنَّمَا التَّوْبَةُ عَلَى اللَّهِ لِلَّذِينَ يَعْمَلُونَ الشُّوْءَ بِحَسَبِ مَا
 تَزَيُّوْنَ مِنْ قَرِيبٍ فَأُولَٰئِكَ يَتُوبُ اللَّهُ عَلَيْهِمْ
 إِنَّ اللَّهَ يُحِبُّ التَّوَّابِينَ وَيُحِبُّ الْمُتَطَهِّرِينَ

The leading schools of law have ruled that repentance is only valid in the *hudūd* offences when it is attempted before the offence is completed and reported to the authorities, but that once it is reported and action is taken, there is no place whatsoever for repentance. This is tantamount to imposing an unwarranted limitation on the more versatile and humane provisions of the Qur'ān. The jurists may have their reasons, reasons that were deemed suitable for their time, but if we find that we can apply the Qur'ān to the realities of contemporary life in the Muslim community while following in the meantime the clear provisions of the text, then juristic formalations that may stand in the way of this more open approach need not be given too much weight. If repentance were to have a meaningful role in the legal proceedings of the *hudūd*, then that role must surely not be confined to inchoate crimes nor only to the pre-trial stage but should logically be extended to the entire criminal process, before and after prosecution and trial. This would necessarily mean a change in the conventional perceptions of the *hudūd*, a transition, that is, from mandatory enforcement to a non-mandatory punishment that is amenable to considerations of rehabilitation and reform.

2. Adultery and Formication (Zinā)

The Qur'ānic text on the punishment of *zinā* is as follows:

The woman and the man guilty of *zinā*, flog each of them one hundred lashes. Let not compassion move you in their case from carrying out God's law, ... unless they repent thereafter and mend their conduct, then, God is Forgiving, Most Merciful. (al-Nur, 24:2-5)

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُم بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ ... إِلَّا الَّذِينَ تَابُوا مِن بَعْدِ ذَلِكَ وَأَصْلَحُوا
عَفْوٌ رَّحِيمٌ فَإِنَّ اللَّهَ

Clause (10) of the Hudud Bill defines *zinā* as “an offence which consists of sexual intercourse between a man and a woman who are not married to each other and such intercourse does not come within the meaning of *waṭi sybḥah* (intercourse by mistake or in doubtful circumstances) as defined in subsection (3). If the person who commits *zina* is “a *mohṣan* (married person), such offender shall be punished with the punishment of *rejam*, being the punishment of stoning the offender with stones of medium size to death.” (Clause 11-1). If the perpetrator of *zina* is “*ghayru mohṣan* (unmarried), such offender shall be punished with the punishment of whipping of one hundred lashes and in addition thereto to one year of imprisonment.” (Clause 11-2).

The Bill identifies a “*mohṣan*” as a person who is “validly married and has experienced sexual intercourse in such marriage”. A “*ghayru mohṣan*” is on the other hand one who is not married or “is already married but has not experienced sexual intercourse in such marriage” (Clause 10.2). The Bill makes no further reference to the current state of the marriage as at the time when

the offence is committed. It thus matters little if a person, although once married, has separated or divorced and has had no access to his/her spouse for a long time.

Muhammad 'Abduh and his disciple Rashīd Riḍā have held that the punishment of *zinā* is only applicable to offenders who at the time of committing the offence were parties to a valid marriage. As for the offender who has married once, but is no longer married, he or she should be punished lightly or at most equal to that of the unmarried offender.¹⁹¹ Abu Zahrah has also reached the conclusion that there is no clear text to determine that a person who has been divorced or whose spouse had died should be classified as *muḥṣan*. He then writes that when there is a separation or divorce, the person no longer qualifies as a *muḥṣan*, and does not qualify for the punishment of *rajm*.¹⁹² The Hudud Bill is completely silent on this and has, once again, taken the harsher of the two available approaches to the definition of *muḥṣan*. There is also no clear authority for the additional one year imprisonment which the Bill has stipulated for unmarried offenders. How can this extremist approach toward severity be justified in the light of so many temptations to promiscuity and *zinā* to which the individual is exposed under the prevailing conditions of modern society?

A glance at the Qur'ānic text above is enough to show that the prescribed punishment of *zinā* is followed by the provision concerning repentance in much the same manner and style as in the text concerning the punishment of theft. The language here is also general and unqualified in that it does not distinguish between married and unmarried persons nor is there any reference to their age, first instance or repetition and so forth.

191 Rashīd Riḍā, *Tafīr al-Manār*, Vol. V, p. 25.

192 Abu Zahrah, *al-Uqūbah*, pp. 101-102.

According to the rules of interpretation that are known to *uṣūl al-fiqh*, a general (*‘āmm*) text must be applied as it is and no limitation must be imposed on it unless there is clear evidence that would warrant a departure from that position.

The Sunna has drawn a distinction between the married and unmarried person and enacted *rajm* (stoning to death) for the former while retaining the Qur’ānic punishment of 100 lashes for the latter. This is said to be a case of specification (*takhṣṣ*) of the general ruling (*‘āmm*) of the Qur’ān by the Sunna, according to the *jumhūr*. The potential conflict between the variant rulings of the Qur’ān and Sunna on the punishment of *zinā* is thus resolved by recourse to *takhṣṣ*.

The Qur’ān itself prescribes that the punishment of *zinā* applies only when the charge is proven by four eye-witnesses, which is almost impossible to obtain. There has not, in fact, been a single instance of the proof of *zinā* in the entire history of Islam by this method, and in nearly all the recorded cases, the proof consisted of confession and circumstantial evidence, such as pregnancy and childbirth. Circumstantial evidence is normally not accepted as the principal means of proof in *hudūd* crimes, but there is precedent that the Caliph ‘Umar Ibn al-Khaṭṭāb has accepted pregnancy as proof of *zinā*. The punishment of *zinā*, whether flogging or *rajm*, is applied only when the charge is proven by valid evidence. The fact that the Qur’ān requires four eye-witnesses for proof is a definite indication that the Sharī‘a does not encourage a liberal approach toward prosecution and punishment in claims of *zinā*. This attitude of restraint has, in fact, been endorsed by the Sunna and also generalised to all of the *hudūd* offences. Thus it is provided in a hadith, reported by the Prophet’s widow, ‘Ā’ishah:

The Prophet, peace be on him said: “Avoid condemning the Muslims to *hudūd* whenever you can, and when you can find a way out for a Muslim then clear his way. If the Imam errs, it is

better that he errs on the side of forgiveness than on the side of punishment".¹⁹³

ادرؤا الحدود بالشبهات من المسلمين ما
استطعتم فان كان له مخرجا فخلوا سبيله فلن
الإمام أن يخطئ في العفو خير من أن يخطئ
في العقوبة.

While recording this hadith, Abu Yusuf has also quoted the second Caliph 'Umar b. al-Khaṭṭāb to have commented that "I prefer to suspend rather than implement the *hudūd* in cases of doubt."¹⁹⁴

This should have been the basic attitude toward the *hudūd*, which has, however, not been the case. The history of *hudūd* has followed a different course and a degree of rigidity has developed concerning the *hudūd* which is in contrast with the spirit of the foregoing evidence. The Hudud Bill of Kelantan has not only followed the hallowed tradition of *taqlīd* concerning the *hudūd* but actually went on to expand the scope of the *hudūd*, from four to six offences, admitting circumstantial evidence in the proof of the *hadd* of *zinā*, and failing to draw any distinction between *zinā* and rape – as I shall presently explain.

The Hudud Bill has come under heavy criticism for its total silence over the problem of rape. The Bill addressed the subject of *zinā* but did not even mention rape, and failed to distinguish the one from the other. In the absence of such a distinction, *zinā* in this Bill is likely to subsume rape, which means that the two offences fall under the same rules. This is all the more likely in view of Clause 46(a) of the Hudud Bill which provides:

193 Abu Yusuf, *Kitāb al-Kharāj*, p. 164; al-Tirmidhi, *Sunan al-Tirmidhi*, hadith 1447; Tabrizi, *Mishkāt*, hadith 3570.

194 Id., p. 165.

In the case of *zinā*, pregnancy or delivery of a baby by an unmarried woman shall constitute evidence on which to find her guilty of *zinā* and therefore the *hudūd* punishment shall be passed on her unless she can prove to the contrary.

The Bill thus places the burden of proof squarely on the shoulders of the pregnant woman, or a woman who has given birth to a child "to prove to the contrary" in that she had not been a consenting party to *zinā*. To apply the rules of *zinā* to rape would thus mean that the rape victim must bring four male witnesses, as required in Section 40(2) of the Hudud Bill, to prove the charge against her attacker, failing which she would be liable to the *hadd* punishment. The burden of proof which normally lies with the prosecution has here been shifted to the defendant to prove that she has been the victim of coercive force. This is totally unjust, and places an almost impossible burden on the pregnant woman to find the required witnesses, as she would almost certainly be unable to find. Notwithstanding the media coverage and public criticism that has been voiced over this issue in 1993 when the Bill was passed, and ever since, the government of Kelantan has not responded but has, on the contrary insisted on retaining the clause as it has been drafted. To prove rape, the victim has to produce four male witnesses of just character who can testify that they have actually seen the act of penetration under coercive force and if she fails, she can be prosecuted for *zinā*; she can also be found guilty of *qadhf* for failure to prove the charge. Unless the rapist makes a confession, which he can in any case withdraw later, the woman is doomed to be punished either for *zinā* or for *qadhf*. It is strongly advisable therefore, to separate *zinā* from rape in respect of both definition and the procedure of evidence and proof, and also to shift the burden of proof, in the case of rape, from the defendant to the prosecution.

Two other points may briefly be made here concerning the punishment of *rajm* for *zinā*, one of which relates to the possibility that the Prophet, peace be on him, may have applied *rajm* prior to the revelation of the Qur'ānic *āyah* in sura al-Nūr at a time when there was no fixed ruling on this matter, and that he consequently covered the matter under *sharā'i' man qablanā*, that is, revelation prior to the Sharī'a of Islam. In this case, the Prophet might have applied the ruling of Torah at the initial stages until the revelation of sura al-Nūr. *Rajm* was originally introduced in the Torah which was applied by the Jews and the Bible did not overrule it; since the Old Testament was also a proof on the Christians, they too applied it. The continued validity of *rajm* under the previous revelations is likely to have invited attention before the Qur'ān made a ruling on the subject.¹⁹⁵ The second point of information that may be given here concerning *rajm* relates to the Qur'ānic *āyah* in sura al-Nisā' (4:25), which I shall presently explain.

To elaborate the first point a little further, I refer to Abu Zahrah who has drawn attention to a hadith, recorded in *Ṣaḥīḥ al-Bukhārī*, to the effect that one of the followers (*tabi'ūn*) asked a learned Companion, whom Abu Zahrah has referred to as "a *mujtahid* among the Companions, 'Abd Allah Ibn Abi Awfā, whether the sura al-Nūr which prescribed the punishment of flogging for *zinā*, was revealed before or after the ruling of the Sunna on *rajm*, to which Abi Awfā gave the answer that "I do not know (*lā adri*)."¹⁹⁶ This tends to introduce an element of doubt (*shubha*) in the chronological order of the two rulings, namely *rajm* and flogging for *zinā*. If it is assumed that the sura al-Nūr came later, then this may be taken to have abrogated the

195 Cf. Abu Zahrah, *al-'Uqūbah*, p. 98 ff.

196 *Ṣaḥīḥ al-Bukhārī*, trans. Muhsin Khan, Vol. VII, hadith 804; Abu Zahrah, *al-'Uqūbah*, p. 98 ff.

ruling of the Sunna on *rajm* and enacted a uniform penalty of 100 lashes for all cases of *zinā*. But the *jumhur* ulema have not accepted this analysis and maintained that sura al-Nur preceded the hadiths on *rajm*, in which case there is no case of abrogation, but of the specification of the general ('*āmm*) of the Qur'ān by the hadith.

Abu Zahrah has also discussed, in this context, the views of the Kharijites and those of some Shi'ah and Mu'tazila to the effect that there is no other punishment for *zinā* in the Sharī'a other than flogging: Had God Most High intended to validate stoning, the Qur'ān would have stipulated so. Since stoning is the most severe of all punishments, it needs to be proven by a decisive text, that is, the Qur'ān or hadith *Mutawātir*. There is no ruling on it in the Qur'ān and the *ahādīth* concerning *rajm*, including the well-known cases of Mā'iz and Ghāmi-diyya are all *Āḥad* and fall short of *Mutawātir*.

Furthermore, a brief examination of the Qur'ānic *āyah* that is quoted below also confirms flogging to be the only Qur'ānic punishment for *zinā*. This *āyah* has, in fact, been quoted by the opponents of *rajm*, including the Mu'tazila and Kharijites. The *āyah* thus provides:

And whoever among you cannot afford to marry free believing women, let him marry such of your believing maidens as your right hands possess ... so marry them with the permission of their families ... Then if they are guilty of adultery when they are taken in marriage, they shall suffer half the punishment of the free married women. (al-Nisā', 4:25)

وَمَنْ لَّمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكَحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ
فِنْ مِمَّا مَلَكَتْ أَيْمَانُكُمْ ... فَأَنْكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ ...
فَإِنْ أَتَيْنَ بِفِجْشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ
مِنَ الْعَذَابِ .

This *āyah* validated marriage with women who were taken prisoners of war at the time. But what is of interest in it here is that it takes for granted the continued validity of the ruling in sura al-Nūr to the effect that the punishment of adultery by a married woman is flogging of 100 lashes, not stoning, for the text enacts half of this as punishment for married slave women. Had the text, in other words, validated stoning for a married woman, than it would fail to make any sense, as stoning cannot be halved. Hence the conclusion that flogging is the only Qur'ānic punishment for all cases of *zinā*.¹⁹⁷

4. Slanderous Accusation (*Qadhf*)

The Qur'ānic text on slanderous accusation (*qadhf*) is as follows:

And those who accuse chaste women and fail to produce four witnesses, flog them eighty lashes and reject their testimony ever after, for they are transgressors – except for those who repent thereafter and reform themselves, then God is forgiving, Most Merciful. (al-Nūr, 24:4-6)

وَالَّذِينَ يَمُونُ الْمُحْصَنَاتِ ثُمَّ لَا يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ
ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ
إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

This text is also self-evident on the provision of repentance for slanderous accusers who repent after committing the offence and reform themselves. Repentance by itself is thus not enough unless it is accompanied by actual manifestations of

197 Cf. al-Zayla'i, *Nash al-Rāya*, Vol. III, p. 330.

reform. But even when the slanderous accuser repents, he may have already inflicted indelible damage on the good name and reputation of his victim. This is perhaps why the Qur'ān penalises him with an equally long-standing supplementary punishment, which is that his testimony may never be accepted again. The conventional discourse on *hudūd* and the *fiqh* rules on the subject of slanderous accusation do not make adequate provisions to make repentance an integral part of the law of *qadhf*.

Clause (12) of the Hudud Bill provides that "*Qazaf* is an offence of making an accusation of *zinā*, being an accusation which is incapable of being proved by four witnesses, against a Muslim who is *akil baligh* and known to be chaste." *Qazaf* under this Bill can also be committed "by saying that a particular individual is not the parent or not the off-spring of a particular individual" (Clause 12.2). The perpetrator of *qazaf* "shall be punished with eighty lashes of whipping and his testimony shall no longer be accepted until he repents." (Clause 13)

The Bill is totally silent on whether the wishes of the victim of *qadhf* (i.e. the *maqdūf*) is of any relevance to the enforcement of the prescribed punishment. The leading schools of law are in agreement that the punishment of *qadhf* is not enforceable unless it is requested by the *maqdūf*, for it consists mainly of the violation of the Right of Man and in this sense it resembles *qisās* (just retaliation) both of which may be pardoned by the victim. It is then added that once the prosecution has begun concerning *qadhf*, it becomes a part of the Right of God to enforce the punishment.

The Bill should have opened up all the avenues whereby a *ḥadd* punishment could be mitigated or omitted. One such avenue would have been to make a provision that the *maqdūf* should formally request the enforcement of the *ḥadd* punishment. The Bill has not made any such provision.

5. Highway Robbery (*Hirābah*)

And lastly, the Qur'ān prescribes a three-fold punishment for highway robbery which consists of crucifixion, cutting of limbs and banishment, depending on whether the robber has both killed and robbed his victim or committed only one and not the other of these crimes, or that he only terrorised the people without inflicting any loss of life and property on them. Having spelled out these eventualities, the text provides that the stated punishment shall apply to the criminals "... except for those who repent before they fell into your power. In that case, know that God is Forgiving, Most Merciful" (al-Ma'idah, 5:33).

إِلَّا الَّذِينَ نَابُوا مِن قَبْلِ أَنْ تَقْرُوا عَلَيْهِمْ فَأَعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

The ulema of the leading schools of law are in agreement that repentance prior to arrest in *hirābah* absolves the offender from punishment in so far as it relates to the Right of God content of that crime, and also in similar other offences that involve violation of community's rights, such as *zinā* and *shurb*, but not if the offence consists of the violation only, or predominantly, of the Right of Man, such as slanderous accusation, or *qadhf*. The highway robber who repents prior to arrest is consequently exempted from the *hadd* punishment but he must return the private property he might have taken. Repentance prior to subjugation and overpowering in armed robbery is considered to be indicative of sincerity and reform, but repentance after subjugation is likely to be due to fear, which is why it is not admissible. But it should be noted that this is a peculiarity of *hirābah* and imposing the same limitation by way of analogy, as many have attempted, on repentance in other *hudūd* offences is not necessarily justified.

The Hudud Bill defines *hirābah* as “an act of taking another person’s property by force or threat of the use of force done by a person or a group of persons armed with weapon or any other instrument of being used as weapon” (Clause 8). The punishment of *hirābah* is prescribed as follows:

- (a) death and thereafter crucified, if the victim is killed and his or other person’s property is taken away;
- (b) death only, if the victim is killed without any property being taken away;
- (c) amputation of right hand and left foot, if only the property is taken away without killing the victim or injuring him ...
- (d) imprisonment for such term as in the opinion of the court would lead the offender to repentance, if only threats are uttered without any property being taken away or bodily injury caused (Clause 9).

The Bill is totally silent on the question of repentance at any stage of the proceedings, before arrest and prosecution or afterwards. The Qur’ān clearly permits repentance prior to prosecution and arrest and the Bill should have made a provision and found a suitable role for repentance, surrender and remorse in the proceedings concerning *hirābah*, especially in cases where the victim of *hirābah* is not pressing for prosecution either.

Our perusal of the textual evidence shows that the Qur’ānic emphasis on repentance is explicit and self-evident in every case of *hudūd*; so much so that references to repentance in all the five instances we have reviewed immediately follow the respective provisions on punishment. The question may now be asked again as to what has happened to all of this, and

whether juristic doctrine on the *hudūd* in the various schools of Islamic law has in any way reflected the Qur'ānic provisions or repentance? My general response to this question, which is based on my review of the *fiqh* expositions on the subject, is that juristic doctrine in the leading *madhāhib* has fallen short of adequately responding to the repeated Qur'ānic references on repentance. Any new legislation on the *hudūd* that seeks to implement these punishments would therefore need to take a fresh look at the Qur'ān and formulate an *ijtihād* – oriented approach to the *hudūd*, even at the expense of departing from the scholastic positions of *fiqh*, so as to make repentance an integral part of the *hudūd* laws. This would mean introducing a degree of versatility into the *hudūd* that has failed to find expression in the works of the *fuqahā'*. Having said this, I now present a brief review of the juristic doctrine of the *madhāhib* on repentance and the effect, if any, it might have on the implementation of the *hudūd*.

Juristic Positions on Repentance

The jurists have held three different views which may be summarised as follows:¹⁹⁸

- (1) Some jurists of the Shāfi'i and Hanbali schools are of the view that repentance suspends the prescribed punishment if it is offered prior to the completion of the offence, provided also that the offence in question belongs to the Right of God (*ḥaq Allah*) category of *hudūd*. All of the *hudūd* are deemed to fall under this category, with one

198 My exposition of these views is based on Ibn Qudamah, *al-Mughni*, Vol. 5, p. 316 ff; al-Kāsānī, *Badā'i' al-Sanā'i'*, Vol. VII, p. 96; al-Ramli, *Nihāyat al-Muhtaj*, Vol. VII, p. 8; 'Awdah, *al-Tashri al-Jinā'i*, Vol. I, p. 357, and Abu Zahrah, *al-Uqūbah*, p. 247 ff.

exception, namely, the *ḥadd* of slanderous accusation, which is held to consist predominantly of the Right of Man (*ḥaq al-Ādami*). This view is based on an analogy that is drawn between armed robbery (*ḥirābah*) and the rest of the *ḥudūd*. Since the Qur'ān clearly stipulates that repentance in *ḥirābah* is admissible prior to the completion of the offence, this ruling is analogically extended to the rest of the *ḥudūd*. The Right of Man component of the *ḥadd*, such as that over the stolen property in the cases of theft and *ḥirābah*, is not affected by repentance and the thief, or the armed robber, even after a valid repentance is required to return the property to its owner, provided that he has repented prior to the completion of the offence. This last stipulation, which confines the scope of repentance to inchoate crimes, virtually marginalises repentance to an extent that it can no longer be said to be reflective of the Qur'ānic provisions concerning it. If this is the effect, as it undoubtedly is, of the analogy to the Qur'ānic provision on *ḥirābah*, then that analogy may be said to be *qiyās ma' al-fāriq*, or analogy with a discrepancy, which is invalid. If analogy to a ruling of the Qur'ān in the original case (*aṣl*) has the effect of violating the spirit and logic of the Qur'ān in the new case (*far'*), then the analogy is no more than a name, a specious analogy, in fact, that should be discarded.

- (2) The Imams Mālik and Abu Ḥanifāh as well as some Shāfi'i and Ḥanbali jurists have held that repentance has no bearing on the *ḥudūd*, except for *ḥirābah*, which is based on the clear text of the Qur'ān. This view is once again based on a somewhat plausible argument that the wording of the Qur'ānic *āyāt* on the punishment of

adultery and theft are general (*'āmm*) and must therefore apply to repenters and non-repenters alike. It is further added that the Qur'ānic references to repentance in conjunction with adultery and theft are concerned with repentance after the imposition of punishment and not before. Although repentance, it is said, is likely to be of spiritual benefit to the offender in this world or the next, it does not, however relieve him of punishment. To open the door of repentance, it is further added, might lead to uncertainty and abeyance in the enforcement of *ḥudūd*. The proponents of this view have referred to the cases of Mā'iz b. Mālik and al-Ghāmidīyyah, who were punished, during the Prophet's time, by stoning for *zinā*. There were also cases of other *ḥadd* offences where punishment was based on confession but it was still implemented, despite the likelihood that confession is indicative of repentance and remorse. This may be so, but the juristic discussion in this part is based on inference rather than on explicit discussion of repentance in those incidents. Besides, the circumstances of each case and the surrounding milieu of society at a given time tend to give individual cases a different context, which need not necessarily operate as a limiting factor on the general language of the Qur'ān concerning repentance. It is significant perhaps to refer in this connection to Mustafā al-Zarqā's observation when he said concerning the *ḥadd* of *zinā* and the application thereof, especially of *rajm*, by the order of the Prophet. Zarqā observed that there is a distinct possibility that the Prophet did so in view of "the circumstances that only a strong and decisive stand on this issue could curb the rampant immorality and

corruption of the time of ignorance."¹⁹⁹ There is also an additional point of information to the effect that both Mā'iz and Ghāmidīyah virtually demanded that they should be punished. It thus appears less than warranted to sideline a feature of the Qur'ānic law on *hudūd* on the basis of what might represent a circumstantial development. To draw from these circumstances the conclusion that the Qur'ānic provisions on repentance only referred to repentance after conviction and punishment is to rob it of all legal significance, which is simply unwarranted. Abū Zahrah has also made the observation that he has investigated the issue and save for *hirābah*, he found no authority to confine the admissibility of repentance to a particular time frame whether before or after the matter is brought to the attention of the court.

The other point that is highlighted by the proponents of this view refers to the general nature of the Qur'ānic text on these punishments, which is also less than convincing, for the text itself specifies, by way of *takbīr*, the position of sincere repenters in each case, not in a different place, but in the same passage, almost immediately after the punishment is proclaimed in each passage. It is once again rather a weak point which turns a blind eye to a portion of the text and does not merit much attention.

199 Quoted in 'Alī Maṣṣūr on the basis of Zarqā's letter to 'Alī Maṣṣūr, the then president of the constitutional court of Egypt and chairman of the Committee on Harmonization of Sharī'a and law in Maṣṣūr's book, *Niẓām al-Tajrīm*, pp. 182-183.

- (3) The third view which is mainly attributed to Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah maintains that punishment itself, like repentance, purifies the person from moral turpitude and sin. Punishment should be suspended upon repentance in the Right of God type of offences provided that the perpetrator does not demand punishment himself. But if he so insists then he or she may be punished even after repentance. This view concurs with the preceding two views in maintaining that repentance does not have the same effect on the Right of Man component of crimes. For in offences of this kind, it is not repentance but pardon, granted by the victim, that deters punishment.

Our review of the *fiqh* literature reveals that only in the case of apostasy (*irtidād*) can it be said that repentance has found a place in the juristic doctrine of the *madhāhib*, but only just so, because imposing a time limit of three days (cf. clause 23(3) of the *Hudūd* Bill of Kelantan) within which the offender must repent – is really reducing repentance to a mechanical formality that is almost meaningless. There is evidently no other place, in the conventional formulations of the *hudūd*, where repentance can play a meaningful role. Repentance prior to the completion of offence is obviously meaningful in *ḥirābah* which involves defiance of the ruling authorities but tends to become no more than utopia when it is applied to other *hudūd* crimes.

It seems that the Qur'ānic emphasis on repentance caught the attention of Ibn Ḥazm al-Zāhiri who wrote the following, apparently on a distinctly different note:

Since repentance is ordained by God and it is highly recommended, it is obligatory on all Muslims (*kāna farḍan 'alā kulli Muslim*) to invoke it in accordance with the injunctions (*al-nuṣūṣ*) that were discussed. Hence inviting the offender to repent prior to the enforcement of *ḥadd* is an obligation, and diligence in it is a duty.²⁰⁰

The hesitation on the part of some leading ulema on the effects of repentance is recorded by Muḥammad al-Ghāzali, in a context where he discusses the permissibility for a *mujtahid* to overrule his earlier opinion. Al-Ghāzali thus wrote that he happened to read Ibn Taymiyyah's book, *Al-Siyāsah al-Shar'iyyah*, in which the author said that the *ḥudūd* were mandatory and they were not to be suspended by repentance. The same author, that is, Ibn Taymiyyah, then wrote in his *Fatawa* that sincere repentance does suspend the *ḥudūd*. On a similar note, Imam al-Shāfi'i held, in his old *madhhab*, that *ḥadd* is suspended by repentance but after his migration to Egypt, the Imam held the contrary view that repentance has no effect on the *ḥudūd*.²⁰¹

If one were to reformulate the *ḥudūd* laws in line with the Qur'ānic guidelines on reformation and repentance, one would need to depart from the notion of fixed and mandatory provisions on *ḥudūd*. It may be possible to combine the Qur'ānic directives on repentance with the prescribed fixed penalties as the upper limit, which is what *ḥadd* really means, but it would be difficult to integrate into this approach the notion of both fixed and mandatory sentences. For that effectively closes the door to the idea of reformation and of

200 Ibn Hazm, *al-Muḥallā*, Vol. XII, p. 36.

201 Muḥammad al-Ghazali, *Turāthunā al-Fikri*, pp. 153-154.

meaningful repentance. Reformation and repentance necessarily involve a measure of discretion on the part of judicial authorities, which may well combine punitive measures of some kind with rehabilitation. The law should, moreover retain the Qur'anic punishment as the upper limit for aggravated cases, hardened criminals and recidivists.

Adequate provisions need also to be made for compensation of loss and damage to private property, or the return thereof in *rem*, whenever possible, but this need not necessarily follow the conventional division between the Right of God and Right of Man, which is a *fiqhi* development in any case, and tends to lead to further complications. For considerations of brevity, I suffice by saying that I have elsewhere elaborated on the Right of God and Right of Man aspect of the *hudūd* as well as on the basic philosophy of *hudūd* in my *Punishment in Islamic law* which is where the reader can find additional detail.

CHAPTER EIGHT

Islamisation, Renewal and Reform

This chapter attempts a general characterisation of Islamisation in Malaysia through a reading of the views of commentators, political leaders and spokesmen from the various strata of society. We begin our analysis with comments from the Prime Minister Dr. Mahathir as to how he saw Islamisation and projected it as from the early years of his leadership.

Government policy in Malaysia under the leadership of Dr. Mahathir since 1981 has moved beyond symbolic Islamisation gestures such as the building of mosques and organising of annual Qur'ān recitation competition, to adopt Islamisation measures into government development plans. Beginning with the Third Malaysian Plan (1976 – 1980) when Dr. Mahathir was Deputy Prime Minister, Islam was included as a source of guidance for the nation. Then under the Fifth Malaysian Plan (1985 – 1990) Islamic values were included and it was emphasised that economic development would not alienate spiritual development and would not sacrifice Islamic values. These steps are often seen as the early harbingers of an

Islamisation policy in Malaysia, although some critics have doubted its very existence, as I shall later elaborate.

Dr. Mahathir's Islamisation policy was not focused on concrete measures but embraced instead broad moral objectives that have often been equated with universal values. Mahathir's administration has in this way tried to open up the scope of Islamisation with a view to making it appealing to the nation as a whole. Values such as discipline, trustworthiness, cleanliness, cooperation and hard work that are advocated by Islam were thus stated to be equally relevant to nation-building and modernisation.²⁰²

Islamic values are thus read in conjunction with universal values of good and evil. Good values that are recognised by other religions are also considered desirable in Islam. To uphold or embrace Islamic values will not therefore mean neglect or destruction of other values in Malaysia.²⁰³

The government advocated moderation and made it clear that UMNO would not become a 'fanatical' party but would stand for moderation and pragmatism in religion.²⁰⁴ It was also stated in an article in the pro-government *Utusan Malaysia*:

Does not Islam teach its followers to call in wisdom?

Does the religion not give priority to reason and logic?

Socio-political realities made it imperative for (early) Muslims to prove Islam's perfection through wisdom (*hikmah*) and good advice (*muw'izah hasanah*) by inviting people to Islam ...²⁰⁵

202 A total of about eleven value-points have been specified which include in addition to the five above, responsibility, sincerity, dedication, moderation, good behaviour and gratitude. Cf. INTAN (Institut Tadbiran Awam Negara), 1991 publication, *Nilai Dan Erika Dalam Perkhidmatan Awam*, Eng. Trans. Norhashimah Yasin, *Islamisation/Malaynisation*, p. 43.

203 *Id.*, p. 232.

204 *The Straits Times Weekly Overseas Edition*, 7 November 1992.

205 *Utusan Malaysia*, 1 April 1990, tr. Norhashimah Yasin, *Islamisation*, p. 234.

The government has put socio-economic development at the head of its action programmes. To improve the lot of the people in the areas of education, health and welfare is given preference to the fundamentalist demand for the enforcement of the Sharī'a. Government leaders have thus condemned the fundamentalists who harped on the application of Sharī'a as a matter of priority even when people are grappling with hunger and disease. Anwar Ibrahim spoke forcefully to denounce this attitude:

This is not Islam, this is just one way of escapism so that people don't talk about social and economic issues, hunger, poverty, corruption and mismanagement.²⁰⁶

Dr. Mahathir criticised "the extremists who want to impose their power on others, to force people to accept their teaching, and in Islam you can preach or persuade, but not force".²⁰⁷

With reference to the enforcement of the Islamic punishments of *hudūd*, Dr. Mahathir explained:

Islam takes special notice of politics, and it grants concessions to Muslims in order to protect them against hardship. If in a multi-racial country like Malaysia, the Muslims had to have their hands amputated (for theft) and the non-Muslims did not, the result would be that Muslims who have lost their hand would be unable to compete with non-Muslims. It must be emphasised that the government's attempt to inculcate Islamic values in the administration should not result in it becoming weak, passive or chaotic. If that happens, Islam's image will be tarnished and it will be seen as counter-development.²⁰⁸

206 *International Herald Tribune*, 6 May 1993.

207 Quoted in *The Times* of London, 26 July 1991.

208 Quoted in INTAN's 1991 publication, *Nilai Dan Erika* (tr. N. Yasin) referred to above at p. 10.

It thus appears that Islamisation in Malaysia has not meant a return to the Sharī'a, which is generally regarded as a defining element of Islamic state and Islamisation. The focus is instead on the broader objectives of Islam and values that can unite the people. Thus according to Dr. Mahathir:

Inculcation of Islamic values is not necessarily doing a particular act of worship ... nor is it meant applying the *budud* law without looking at the political situation. The Islamic values which are to be absorbed are those which can create an efficient government able to administer efficiently in terms of peace, security and development. The government which uses Islamic values will always achieve success But if Islam is interpreted narrowly or incorrectly, therefore, the administration will fail.²⁰⁹

If applying Islamic values in a broad sense is one of the principal themes of Islamisation in Malaysia, economic development is also seen to be an integral part of it. The former Deputy Prime Minister, Anwar Ibrahim, thus emphasised that "promoting economic growth is as Islamic as it can be. How can we eradicate poverty and raise the livelihood of the people if there was no growth."²¹⁰ Dr. Mahathir even went further to refer to the NEP and NDP as a *jihād* (struggle) when presenting his economic plan and vision 2020 in February 1991. The idea to make Malaysia a fully developed economy by the year 2020 was thus termed as a manifestation of *jihād*.²¹¹

As the New Economic Policy was approaching its conclusion, a full-scale long-term vision for the national development was instituted within the Vision 2020 framework. The plan accordingly is for Malaysia to become "a fully

209 Quoted in INTAN publication as in the previous note, p. 13.

210 Quoted in the *New Straits Times*, Kuala Lumpur, 9 December 1992.

211 Cf. Norhashimah Yasin, *Islamisation*, p. 239.

developed industrial country by the year 2020 in all aspects, not only the economic,"²¹²

Two thousand and twenty is the target year, and the Vision is commonly known as "twenty-twenty" as it suggests, from the medical viewpoint at least, a perfect vision. The emphasis is clearly on all-around development that pays much attention to issues of social justice, ethnic relations, nurturing of a caring society, religious and cultural issues.

Government leaders have evidently referred to Islamisation in a broad sense and in terms of Islamic values that guide policy without actually reducing it into a specific plan or concrete measures. Islamisation is not tied to the *Sharī'a*, and what is said of Islamisation often means reform of the conventional rules and a departure therefore from them. This general and, in some ways, non-committal aspect of Islamisation in Malaysia has enabled critics and commentators to raise questions about the credibility, and even existence, of an Islamisation policy in Malaysia.

In response to the question as to whether Malaysia has a programme of Islamisation, it is said that even if it has one it is not well-defined, and the situation does not seem to be any better elsewhere in the Muslim countries either. Although it is generally acknowledged that Malaysia has followed an Islamisation policy in recent years, it has been said to be paradoxical and pulled in different directions. "Impelled by the rapid industrialisation over the past seven to ten years", as Norani Othman wrote in 1991, Malaysia was said to have combined its Islamisation policies with a growing modernity of lifestyle and material culture.²¹³

212 Dr. Mahathir, *A New Deal for Asia*, p. 41.

213 Norani Othman, "The Socio-Political Dimensions of Islamisation in Malaysia", in ed. Norani Othman, *Sharī'a Law and the Modern Nation-State*, p. 134.

Another commentator noted that "Islamisation is not a formal policy, it has no definite starting date and it is undocumented except for brief mentions in the third and subsequent Malaysia Plans. Its content has been mostly made known by verbal statement of UMNO leaders".²¹⁴ The Islamisation phenomenon in Malaysian politics also tends to be inconsistent and ambiguous as its objectives remain far from articulate and comprehensive. This lack of clarity has in turn led to much speculation as to what its real objectives might be. The fundamentalist camp has maintained that the ultimate objective of any Islamisation policy has to be a total Islamisation of the legal system and the eventual formation of an Islamic state. The Mahathir administration in the late 1990s tended to suggest that Islamisation consists mainly of inculcation of Islamic values in government policies. But since Islamisation remains almost totally undocumented, it can easily be adjusted and given a new dimension so as to suit any particular government objective.

Although in theory it remains undefined, some of the visual manifestations of Islamisation in Malaysia in recent years can be identified nevertheless, including, for example, the introduction of Islamic legislation, establishment of Islamic banking and insurance, the Islamic University, the Hajj administration (Tabung Haji) and so forth. On the individual level, there has been an increased consciousness among the Muslim youth regarding matters of personal morality, intermingling of the sexes, drinking, gambling and clothes. More and more women began to visibly dress modestly. In the sphere of public life, the media provided more coverage on religious programmes, more television time for the *ādhān* (call to the ritual prayer) the Qur'ān reading contests, talks and

214 Norhashimah Yasin, *Islamisation*, p. 367.

interviews to educate both Muslims and non-Muslims in the precepts of Islam. There was also growth in *dakwah* (Islamic propagation) organisations which emphasised proselytisation among non-Muslims and increased communication among Muslims. Muslim holidays became more national in scope while politicians began to stress Islamic issues more frequently. The government extended better allocations and facilities to the construction of mosques and religious halls.²¹⁵ One observer noted, however, that "the State's current Islamisation projects" have been undertaken under some political pressure from, notably, the Islamic party PAS, the Muslim youth movement ABIM and the now defunct AlArqam movement. Government policies on Islam and Sharī'a are sometimes determined under the pressure of circumstances and have at times contradicted its own agenda of a "Muslim culture of modernity".²¹⁶ Government-sponsored programmes on radio and television on family life, marriage and divorce, some of the Ministry of Social Welfare programmes, and Sharī'a court decisions in maintenance and custody matters, especially involving non-Muslim wives and children have come under criticism by commentators. These are described as "moralising, authoritarian and ... simplistic".²¹⁷ The readiness of the leading ulema who hold official government positions to subscribe to a "form of clericalism that runs altogether counter" to the spirit and ideals of *ijtihād* can only be put down to their "defensive and close-minded" attitude to issues of concern to modern society.²¹⁸ An Islamic culture of modernity requires that forward-looking Muslims in Malaysia

215 Cf. Yousif, *Religions Freedom*, p. 161.

216 Norani Othman, "Socio-political Dimensions," p. 134.

217 *Id.*, p. 135.

218 *Id.*, p. 137.

and elsewhere in the worldwide *umma* engage themselves not only in imaginative *ijtihād* but to devise and make use of new methods of sociolegal and religious reasoning.²¹⁹ For those who are open to the prospect of reform (*iṣlāḥ*) and renewal (*tajdīd*), it is added "history as it unfolds holds out new and ever greater possibilities for the actualisation of the Qur'ānic ethical and social vision".²²⁰ It is thus emphasised that "we must endeavour (*jahd*) to give expression to Islam's sociolegal aspirations in a far more profound and just form than was ever possible" in the past under circumstances that constrained even the most noble thinkers of earlier Islamic civilisation.²²¹

For Syukri Salleh Islamisation has broadly meant the necessity to Islamise everything that is considered "un-Islamic". It connotes for some a process of "converting" (in Malay one might literally use the term *memuallafkan*) all un-Islamic things, including an aspect of life or a system, into a form acceptable to or within Islam. The underlying assumption of this approach is that many of the existing facets of life and the social system through which they are organised are un-Islamic. They must therefore be realigned with Qur'ānic injunctions and the teachings of the Prophet Muhammad.²²² Islamisation of state and society must evolve simultaneously from below and from above, involving both the individual and the state. It must begin from within the individual self, with faith, piety and a sense of commitment to virtue forming the essential foundation of the state and society. From this foundation emerges an Islamic family and later an Islamic

219 Id., p. 153.

220 Id., p. 148.

221 See Rose Ismail, ed., *Hudud in Malaysia*, p. 10.

222 Muhammad Shykri Salleh, *Islamisation of State and Society: A Critical Comment*, in ed. Noraini Orhman, *Shari'a Law and the Modern Nation-State*, p. 106.

society, in time an Islamic state and eventually a strong Islamic *umma*. What emerges through this gradual process will gradually replace the existing system and evolve a self-sufficient society beneficial to all mankind.²²³

Chandra Muzaffar is critical of Islamisation, both within Malaysia and beyond, as having been "concerned more with the symbols rather than the substance of the religion, with what is peripheral rather than fundamental to Islam." A part of the explanation is to be found in the character and orientation of the dominant Islam. It is an Islam which is "conservative, orthodox and doctrinaire...more comfortable with established tradition than with new interpretations of social justice and freedom guided by the Qur'anic vision".²²⁴ For Islam to provide a viable alternative, it will have "to go beyond its present religio-cultural boundaries...and even understanding of itself". Its values, principles and laws will have to be interpreted and articulated in such a way that human beings everywhere ... will be able to identify with them".²²⁵ Haridas attempted to identify some of the challenging issues for the future of Islam in Malaysia when he observed:

The authentic and human Islamic spirit must be seen to express itself in more than superficial or external cosmetic changes. It must challenge human conscience and activate the inner growth of our transcendent nature and spirit. Unless they are grounded within such a commitment and approach, these various Islamisation initiatives will be made unable to withstand the pressure of ethnic exclusivism²²⁶

223 Id., p. 110.

224 Chandra Muzaffar, "Islamisation of State and Society : A Critical Comment", in N. Othman ed., *Shari'a Law and Modern Nation-State*, p. 116.

225 Id., p. 122.

226 K. Haridas, "Islamisation of State and Society", in N. Othman, ed., *Shari'a Law and the Modern Nation-State*, p. 102.

Members of the opposition Islamic party (PAS) have denounced the government policy for having deviated from true Islam. Thus according to a former PAS President, Yusuf Rawa:

UMNO's Islam has been piecemeal in approach or meant for political purposes to win Malay votes. UMNO does not actually subscribe to true Islam. Look at the many vices in our society – drinking, prostitution, free mixing of sexes, and other moral laxities – these continue unabated because the government's commitment to the faith has always been politically motivated.²²⁷

Yusuf Rawa is quick to acknowledge that "we in PAS also require votes and support from the people," but that PAS would not sacrifice its principles for the sake of winning votes. Rawa then expounds the familiar theme of PAS that "the solution to the many problems in this country today lies in the creation of an Islamic state." The Islamic state according to Yusuf Rawa will have an elected Parliament but all legislation will have to be "scrutinised by the Ulema Council. The goals of the Islamic state, and our party's goals, are clearly spelt out in our constitution (Art. 51) which stipulated that our final objective is to realise Islamic values and teachings in our daily lives. All the country's social, economic and political systems must tailor to Islamic values."²²⁸ To put all this into action is certainly not self-evident and Yusuf Rawa has acknowledged this when he said that "we in PAS have been accused of having only general ideas about the structures and functions of an Islamic state whose establishment we call for." It is then stated

227 Mutalib's interview with Yusuf Rawa in in Mutalib, *Islam in Malaysia*, p. 99.

228 *Id.*

that elaborating on the detailed functioning of an Islamic state is not practical, but if the people want to see whether PAS operates it well, "they must elect us first." But the next point that Yusuf Rawa makes is that "the Islamic state has yet to be fully understood. That is why so many non-Muslims get increasingly fearful of such a state whenever we raise the issue."²²⁹ It should be noted that PAS's view of the Islamic state is entrenched in the Sharī'a in much the same way as it is expounded in the works of the founding jurists. PAS has not taken a reformist approach to Islam or the Sharī'a and this begs the question as to whether a totally tradition-bound approach to Islamisation would, in fact, be feasible. We have already had the occasion to explore an aspect of this question in our discussion of the Hudud Bill under the PAS-led government in Kelantan and the resistance that it has generated. That attempt has clearly not been without problems. The question is whether the Kelantan government will acknowledge and do something about them.

The former ABIM (the Muslim Youth Movement of Malaysia) President, Siddiq Fadhil, has taken a relatively mild approach, compared to that of PAS, when he commented that "we see the government's Islamisation policies as a positive sign. However we like to see more being done to check the secularistic trends in the country and the rather *ad hoc* approach to Islamisation by the authorities."²³⁰

Fadhil has expressed ABIM's commitment to consultation and consensus or *shūrā* and a collective style of leadership that exerts itself in search for Islamic solutions to the problems of humanity. ABIM carries out Islamic work

229 Id., p. 100.

230 Mutalib's interview with Siddiq Fadhil in Mutalib, *Islam in Malaysia*, p. 97.

based on the belief that God has entrusted man as His vicegerent and *khalīfah* in the earth with the *amānah* or responsibility to spread the Islamic message of good will, peace and progress for the whole of mankind. ABIM is conscious of the need to see that Islam is spread through a peaceful and democratic process. Fadhil added that ABIM has worked for the unity and solidarity of the Muslim *ummah* through participation and liason with international Islamic groups, yet Fadhil says that ABIM is pragmatic enough to know that the Islamic revolution of Iran, although a welcome development in itself, is not suitable for Malaysia "because our history and society are different from Iran."

Fadhil also made a point of ABIM's independence. While acknowledging ABIM's close contacts with other *dakwah* groups and PAS he added that ABIM is an independent organisation. "If any of our leaders want to be partisan and sympathise with other political parties, such as UMNO or PAS, we will insist that they resign from ABIM and pursue their own ways."

ABIM is affirmative on the establishment of an Islamic state in Malaysia, for they see Islam as the better alternative to the prevailing situation of the country. "In Malaysia, it is clear that secular, capitalistic and materialistic values have miserably failed our people, all Malaysians. So, what is the alternative? To us, it is Islam, translated politically to mean an Islamic state." But the Islamic state that ABIM is advocating is "not the extremist, inflexible and narrow state that people usually refer to when they discuss the issue." ABIM calls for a transformation of the "legal, political and economic structures" of Malaysia into an Islamic one, a state where there is equality, justice and tolerance of the interests of others.

Fadhil also confirmed ABIM's affirmative stand for the rights of non-Muslims to be safeguarded and honoured. As an

Islamic organisation, ABIM is "mindful of their anxieties, which is why we have met them and talked to them." ABIM can assure non-Muslims that the Islamic state "when properly implemented, will in fact improve their welfare and security more than what they are enjoying right now in this country."²³¹

Mohamad Nor Manuty (who later became ABIM President) spoke critically of government policy when he commented in 1990 that:

"Infusion of Islamic values" is not the same as "Islamisation." This is because Islamisation means a process of changing something un-Islamic into purely Islamic Infusion of certain values in the administration implies that no structural change is attempted. For the Islamists who love Islam, such a process of Islamisation is insufficient.²³²

Kamal Hassan has taken a broader view of the realities of Islam in Malaysia when he wrote in his paper "Islam, Malaysia and Europe" on a general note that contemporary Islamic ethos is concerned primarily with "internal critique and moral reform, and then the desire to infuse the Muslim socio-political order with the values of justice, righteousness, accountability to God and equality." The mainstream Islamic consciousness that is manifested in Malaysia normally seeks social change either through the electoral process, or by the methods of critical/corrective participation in the existing systems, mobilisation of public opinion, advocacy of civil society and consultation.²³³ Kamal Hassan has also observed on a realistic note:

231 Id., pp. 97-98.

232 Manuty, *Perception of Social Change in Contemporary Malaysia*, Ph.D thesis: Temple University, 1990, pp. 305-306.

233 Mohd. Kamal Hassan, "Islam, Malaysia and Europe: The Need to Build Bridges," p. 2.

The pluralistic nature of Malaysian society with its conflicting and sometimes antagonistic pockets of communalistic sentiments ... does not make it easy for any democratically elected government to rule the country over a long period of time ... Malaysia is uniquely blessed with an accommodative multi-religious and multi-cultural pluralism which contributes to harmonious relationships.²³⁴

Kamal Hassan went on to say that peaceful relations among the various interest groups in Malaysia has meant that "Muslim or non-Muslim opposition voices or interests do not need to go underground, as is happening in several Middle-Eastern countries, or seek unconstitutional means to achieve their objectives through the use of violence, subversion and revolution."²³⁵

It thus appears that the government policy lines on Islamisation differ widely from those that are advocated by PAS and ABIM. The Mahathir government has not shown any inclination to change its position but has called for a more open approach to Islamisation. In his demand for an enlightened reading of Islam and its Sharī'a, Dr. Mahathir has called for an unencumbered approach to interpretation of the teachings of Islam in the light of prevailing reality, and a recourse in the meantime to the broader objectives *maqāṣid* of the Sharī'a. He was evidently critical of the traditional ulema interpretations of the Qur'ān when he said it was important that the Qur'ān was correctly understood. In order to fully understand the Qur'ān "we need to study also the Sunna and the Hadith. Indeed, we need, in the process of *ijtihād*, to

234 Id., p. 8.

235 Id., p. 7.

analyse and interpret the contents" of both the Qur'ān and Sunna.²³⁶ Dr. Mahathir added that the Qur'ān gives general guidance which covers every kind of situation. There is unfortunately a tendency among some ulema to be rigid in their interpretation and to believe in their own interpretations, and it is such people who cause misunderstandings among Muslims. The Qur'ān has sometimes been interpreted by people with vested interests, and many have also insisted on the literal reading and interpretation of the Qur'ān. "To do so would be to limit the vast lessons that are contained in it for the Muslim *umma* and for humanity".

Anwar Ibrahim also criticised the rigidity of outlook that characterised the Islamic scholarship of the era of uncritical imitation *taqlīd*, where innovation, change and enquiry became suspect. The ulema increasingly devoted themselves to issues of *fiqh* and confined their horizons to textual studies of language, traditions and orthodox jurisprudence. They became "absorbed not in the urgent task of championing the broad vision and civilizational ideals of Islam in the face of the onslaught of the modern secular ideologies, but in attempting to unearth past solutions to resolves sometimes petty issues".²³⁷

To revive the spirit of enquiry and reasoned discourse requires no less than "a thorough transformation of mental outlook". While saying this Anwar Ibrahim added that in order to regain "their central position in society, the ulema need to manifest intellectual vigour and societal relevance".²³⁸

236 Speech by the Prime Minister Dr. Mahathir at the Opening of the 4th International Seminar on al-Qur'ān at Pusat Islam, Kuala Lumpur, 2 February 1994.

237 Anwar Ibrahim, *The Asian Renaissance*, p. 117.

238 Id.

Muslims need to address urgent socio-economic issues such as the eradication of poverty and illiteracy, the provision of employment, decent housing and other social amenities. These are preconditions before certain specific Sharī'a injunctions can be translated into legislation. To do otherwise and to be contented with the construction merely of "an outer edifice of Islamic governance without the true substance of physical and spiritual well-being of the *umma* would be a travesty of the *maqāṣid al-Sharī'a*", the ideals and objectives of Islam itself. It would be tantamount to insisting on a form of religion devoid of substance.²³⁹

Referring to al-Shatibi's theory of the *maqāṣid al-Sharī'a*, Anwar Ibrahim noted that this has been relegated to obscurity notwithstanding its emphasis on the values of Islam which are of universal and perpetual significance. The *maqāṣid al-Sharī'a* promote the humanitarian and compassionate values of Islam as opposed to the literalism and legalism of mainstream Islamic jurisprudence. The latter effectively portrays Islam as a static religion which has lost its relevance".²⁴⁰

Dr. Mahathir has made the observation that "if Islam appears rigid and doctrinaire, it is because the learned interpreters make it so. They tended to be harsh and intolerant when interpreting during the heyday of the Muslim Empires."²⁴¹ This may be illustrated by reference to the fact that administering justice and avoidance of injustice is stressed in numerous places in the Qur'ān. Yet the tendency has been to take just one verse and to interpret it without concern for the result, justice or injustice. "And so Islamic justice can

239 *Id.*, p. 118.

240 *Id.*, p. 189.

241 Dr. Mahathir Mohamad, *Islam the Misunderstood Religion*, speech at the Oxford Centre for Islamic Studies, Oxford, U.K., 16 April, 1996, limited issues by Prime Minister's office, Kuala Lumpur, p. 28.

become quite contrary to the claim that Islam upholds justice".²⁴² What Muslims must do is to go back to the Holy Qur'ān and the genuine hadith, study and interpret them in the context of the present world. It is God's will that the world has changed, and it is not for man to reverse that. Islam is for all times and for every part of the world not just for the seventh century Arabs, and Muslims must try to understand this.²⁴³

Dr. Mahathir has thus emphasised that Islam provides the basic inspiration and message, but the ulema have encapsulated the transcendence and universality of that message into a certain time frame that need to be revised, updated and reformed through *ijtihad* that is reflective of the realities of contemporary life.

Scholars must also bear in mind that the interpretation they attempt is "in the interest of Islam and the Muslims". Dr. Mahathir added that it was no longer advisable to confine the interpretation of the teachings of the Qur'ān to the religious scholars only. The problems of today require that scholars of other disciplines be also involved in the interpretations.

Dr. Mahathir is also critical of the dominantly linguistic and Arabic-centred approach to the Qur'ān. Thus he said in a speech at the Arab Language Centre in Kelantan:

It is extremely arrogant for Malays who understand modern Arabic to claim that only their understanding and interpretations are accurate; that whoever studied the religion through the interpretations and translations of other ulema in another language is inaccurate and unacceptable. A person who studied Islam but did not understand Arabic is not always wrong compared to another who understands Arabic.

242 Id., p. 5.

243 Id., p. 28.

Everyone is susceptible to errors in understanding or interpretations or translations.²⁴⁴

Dr. Mahathir added that differences in the interpretation of the Qur'ān has been with us for a long time and it is a continuing phenomenon. This is because the Qur'ān is meant for differing situations, and variant interpretations are attempted through the process of *ijtihād* depending on the nature of issues and prevailing circumstances of the time.²⁴⁵

In conclusion it may be said that Dr. Mahathir's earlier views on Islamisation were concerned with broad and general values that were advocated by Islam and had a universal appeal that struck a common note with other legal and religious traditions. His more recent observations are concerned with re-interpretation and *ijtihād* that draw relevant and meaningful conclusions from the teaching of the Qur'ān and Sunna on contemporary themes. Islamisation is no longer to consist only of activating the existing doctrine and interpretation of the sources of Islam that were attempted in earlier times but also of projecting a fresh vision of the teachings of Islam. Dr. Mahathir has thus injected a stronger academic content into his views on Islamisation and has posed challenging questions to the Muslim scholars and ulema. The government's view of Islamisation in Malaysia may be said to be now concerned more closely with reinterpretation and reform of Islamic doctrines than it had been in the earlier years of the Mahathir administration.

244 Prime Minister Dr. Mahathir's speech at the Arabic Language Centre in Kelantan on March 3, 1994. English translation of the full text of the original Bahasa Malaysia appears in Rose Ismail, ed., *Hudud in Malaysia*, p. 64 ff.

245 Id., p. 64.

References to the formation of an Islamic state by PAS and ABIM leaders are less than articulate as to detail and the debate has not moved into such matters as to discuss the general framework of an Islamic constitution and its defining elements. Some commentators have made references to a *shūrā*-based parliament and to restoring the Sharī'a but most of these are concerned with generalities and on the whole *taqlīd*-oriented. Questions that are being raised in the context of reform of the Sharī'a and *ijtihād* in relationship to contemporary conditions have not been articulated even by the PAS leaders of Kelantan, who might be expected to be engaged in *ijtihād*-related matters.

CHAPTER NINE

Non-Muslims and The Sharī'a

The fresh emphasis on Islamisation and revival of the Sharī'a in Malaysia has also placed a greater emphasis on the question over the receptiveness or otherwise of non-Muslims to such efforts. It is generally noted that the non-Muslim citizens of Malaysia "fear the imposition of the Sharī'a", and that the grounds for their apprehensions are often evidenced in "attitudes towards them and to some extent in the way they are treated". Haridas who noted this has also reached the conclusion that some of "the less than enlightened and principled understandings of Islam" that are witnessed in Malaysia "fall far short of the Qur'ānic ideals of equality and justice".²⁴⁶

Haridas explained that the multiethnic and multi-religious character of Malaysian society tend to make Malaysian politics prone to political expediency whereby the objective and universal teachings of Islam are often contained

246 K. Haridas, "Islamisation of State and Society", in Norani Othman ed., *Sharī'a Law and the Modern Nation-State*, p. 99.

and compromised by local issues. The media then joins hands and tends to "distort the pristine purity of Islam". Appeals to religion are made "with whipped-up emotions in the context of adversarial politics" all of which contribute to an outlook among non-Muslims that tend to "stress the negative aspects of such initiatives".²⁴⁷

Haridas has listed a number of issues that cause concern among the non-Muslims of Malaysia in the event, however unlikely though, of the coming into power of an Islamic state in Malaysia. These issues also feature prominently in a circular letter of the Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikkism (MCCBCHS). The issues highlighted in this document may be summarised as follows. I have also added my comments as and when the occasion has presented itself.

1. The equality of non-Muslims in an Islamic state. Haridas has not elaborated, but the MCCBCHS circular has it that "In an Islamic state, where the Sharī'a is applied to all citizens, non-Muslims are not treated as equal partners". References are made, in this circular, to some controversial statements that are found in the works and statements of the late Pakistani scholar, Abul A'la Maududi, the former PAS leader Baharuddin Haji Abdul Latif, and in a book by Abdurrahman Kurdi, bearing the title *Islamic State*, on the status of non-Muslims therein. The choice of these three commentators is somewhat eclectic, for the literature on the attributes and defining elements of Islamic state is diverse, and in many ways exploratory and inconclusive, so much so that quoting a

247 Id., pp. 98-99.

book like that of Kurdi would be of little help to be relied on as basic evidence.²⁴⁸

2. Varieties of interpretations of Sharī'a and the power of the ulema. Both Haridas and the MCCBCHS circular seem to agree that the "problem lies not in principles but in the interpretation and the actual implementation of these principles".²⁴⁹

The MCCBCHS itself can play a role, as it has in the past, in promoting understanding and good relations among the various religious groups. It has served as a consultative forum in inter-religious deliberations and given advice to government policy makers on relevant issues. It maintains regular contact with Pusat Islam, the Institute of Islamic Understanding Malaysia (IKIM), the International Institute of Islamic Thought (ISTAC) and other organisations. The Council has often been consulted regarding the establishment of new places of worship for non-Muslim communities in Malaysia and matters of concern to better communication and understanding among the various religious groups in the country. The Council operates from Kuala Lumpur but has seven branch offices in the various other parts of Malaysia.²⁵⁰ There is admittedly much scope for advancement of better understanding through joint colloquia, media and publications. The government of

248 Cf. MCCBCHS Circular, p. 4. The reader may also wish consult my recent book *Freedom, Equality and Justice In Islam*, Kuala Lumpur: Ilmiah Publishers, and the Islamic Foundation U.K., 1999, p. 236ff.

249 Id., p. 2.

250 Cf. Ahmad Yousif, *Religious Freedom*, p. 187.

Malaysia established IKIM for this very purpose and the concern that is expressed for better understanding and correct interpretation of Islam is generally valid.

3. Issues relating to the principles of *naskh* or abrogation in the Qur'ān and the understanding therefore of the principle that "there is no compulsion in religion" (al-Baqarah, 2:256). This is said to have been abrogated by the *āyat al-sayf* (the verse of the sword) in which the Muslims are ordered to fight the infidels until they are subdued and until justice and faith in God prevails everywhere.²⁵¹ Space does not permit fuller elaboration but the claim of abrogation here is controversial and excessive, and nothing in the name of *naskh* is acceptable to override the Qur'ānic declarations on freedom of religion.²⁵² Exaggerated claims have been made of the occurrence of abrogation in a large number of places in the Qur'ān so much so that according to some claims, the verse of the sword (al-Tawbah, 9:36) alone has abrogated 140 *āyāt* in the Qur'ān. What is meant by claims of this type is that all the teachings of the Qur'ān that contain guidance on peaceful relations with the non-Muslims as well as its teachings on patience, forgiveness, generosity, compassion and so forth have all been suppressed and abrogated. Muslims themselves are far from agreeing on such allegations, and it is not quite justified to treat such exaggerations as settled law and basic evidence in a document such as the one under review.

251 Cf. MCCBCHS Circular at p. 2.

252 See for a discussion of *naskh* Kamali, *Principle of Islamic Jurisprudence*, p. 164 ff.

4. The inability of non-Muslims to testify against Muslims in Shari'a courts.

The position here is also not as categorical and clear as this. There are variant views on this and some scholars, including Ibn Taymiyyah, have gone on record to qualify non-Muslims as witnesses in the discovery of truth both for or against the Muslims. Only in religious matters in which non-Muslims are not expected to be conversant are they precluded. This is the case, for instance, with regard to the *hudūd* offences in which only Muslims may serve as witnesses. The reason for this is that difference of religion is regarded as a ground of doubt (*shubb*), and there is a hadith which proclaims that the prescribed punishments (*hudūd*) must be suspended in all cases of doubt. To serve as a witness in the service of truth and justice is, however, always commendable and Islam does not suppress discovery of truth and the avenues that might lead to justice in such categorical terms. Some of the restrictive rulings of the schools of law on this may be due for a review. I have elsewhere attempted a fuller analysis of issues over Muslim-non-Muslims equality in my book, *Freedom, Equality and Justice in Islam*, which the reader may wish to consult.

5. The evidence of two women being equal to that of only one man.

This may be said to be an issue primarily for the Muslims themselves and not, as it were, something that the Muslims have chosen to inflict on the followers of other faiths. There have also been contributions on this issue in the reformist thought of Muslim scholars, including Ibn Qayyim al-Jawziyya and Maḥmūd Shaltūt, to the effect

the Qur'ān had not put a ban, in black and white terms, on the precise equation of two to one, but reflected the prevailing conditions of the Arab society at the time. It may not be too far-fetched to call this what is known in Islamic jurisprudence as time-bound legislation (*al-tashrī' al-zamānī*) that was basically meant for its particular time. Generally speaking, giving testimony for the sake of truth and justice is an act of merit which the Qur'ān has encouraged and recommended, and no black and white restrictions need to be imposed on it. The judge should exercise discretion and admit testimony of males and females in any order if it proves to be the only way to administer justice.

6. Issues relating to conversion and its effects on children.
This is a matter to be regulated largely on the grounds of *siyāsah shar'īyyah*, or Sharī'a-oriented policy that determines the best manner in which to implement the general guidelines of Sharī'a. The basic principle of respect for freedom of religion and encouragement of good relations in the community should be observed and translated into specific policy directives. The Qur'ānic proclamation that "there shall be no compulsion in religion" (al-Baqarah, 2: 256) provides the basic guideline here, and this should be supplemented by policy measures that secure the best interests of all children.
7. Discrimination in the building of temples, churches etc.
My own comment on this is basically the same as in the preceding item. It may be added, however, that despite it being a sensitive issue, the Malaysian authorities seem to have handled it reasonably well. The allocation of land for building of shrines, temples and cemeteries has not been

free of problems and resentment on the part of religious communities. The issue became the focus of attention in a Chief Ministers conference in 1983 which agreed to control the somewhat indiscriminate building of shrines and temples. However, in his July 1997 interview, the General Secretary of MCCBCHS, Thiaraja, argued that the problem concerning the construction of new places of worship is often caused by non-Muslims themselves who do not know or follow proper procedures for building new places of worship. Thiaraja stated that the government on the whole does allocate land to non-Muslims, if the right procedures are followed.²⁵³

8. Restricted access to foreign priests and religious teachers. This too may be said basically to be a discretionary matter that is the proper subject of *siyāsa shar'īyya*. Decisions of this nature depend to some extent on the state of relations among communities and governments. While the Sharī'a provides general guidelines, the specific measures concerning them may be determined by the ruling authorities. Having said this, some restrictions have been placed on the propagation of other religious doctrines among Muslims, as well as on missionary workers and guest speakers from overseas visiting Malaysia. These restrictions tend to be selective and the impression conveyed by Thiaraja, General secretary of the Malaysia Consultative Council of Buddhism, Christianity, Hinduism and Sikhism, is that these were not problematic. When priest visitors are invited, Malaysian

253 Cf. Ahmad Yousif's interview with Thiaraja in Kuala Lumpur, July 17, 1997 in Yousif, *Religious Freedom*, p. 175.

Immigration usually solicits recommendations from the host party, such as the Malaysian Hindu Sangham and permission is granted on a case-by-case basis.²⁵⁴

9. Restrictions on the use of religious language and words (such as "*Allah, salām*, etc") which limits the possibilities of interfaith dialogue.

The Prophet has declared in a hadith that "utterance of a good word is a form of charity" *"al-kalimat al-ṭayyibati ṣadaqatun,"* apparently without any qualification as to whether the speaker should be a Muslim or otherwise. If Islamic religious words are used for what they stand without distortion, for the purpose of nurturing good relations, there should be no objection. Muslims may also use forms of greetings that are known of other faiths to enhance good relations in the community, and there should not be any objection to that either. Having said this, however, problems were encountered concerning the use of such Islamic words as *al-Kitāb* (book), *bayt Allah* (house of God), *ṣalāt* (ritual prayer) and *du'ā* (supplication) in the context of Christianity. An Indonesian translation of the Bible had utilised some such words in reference to Christian religious beliefs. Christians in Indonesia had reportedly imitated some of the Muslim traditional practices and expressions in an effort to entice Muslims to participate in their activities. *Al-Kitāb* was thus used in reference to the Bible, *bayt Allah*, in reference to the Church, and *mi'rāj* (ascension) in reference to the ascension of Jesus Christ. In 1989 the Malaysian Government segregated 42 such Arabic-derived Malay words and

banned their use among Malaysian non-Muslims. The ruling has had negative connotations and subsequent deliberations with the MCCBCHS led to their reduction to twenty-two and ultimately to four words. It was also decided that only Christian book stores may sell Bible translations in Bahasa Malaysia.²⁵⁵

10. Enforced removal of symbols.

There have been cases in the past of decisions in government departments and in some university campuses of Malaysia which discouraged the wearing of "Islamic" dress by Malay and Muslim women. The response to such decisions had been generally mixed, on grounds basically of encouraging uniformity in the image, rightly or wrongly, of a suitable work environment. Provided that such decisions are not discriminatory nor biased, Muslims and non-Muslims may deliberate over them and try to reach an understanding concerning them.

Having said this, Islamisation in Malaysia seems to have made non-Muslims more assertive of their identity, which is in turn manifested in greater emphasis on symbolism, dress and customary practices. Non-Muslims have turned to religious rites and symbols which were dormant in the past, in an attempt, evidently to assert their identity. A Buddhist festival like *Wesak* attracted little attention in the 1960s but became increasingly popular in the 1980s and 1990s. This may also be said of the Hindu festivals such as *Thaipusam* which has had a comeback after years of limited popularity. Some have attempted to explain the present religious and cultural revival among non-Muslims

255 Id., pp. 96 and 177.

as a reaction to religious revivalism among the Malays. The Malays are said to have become increasingly wary about dress, eating and socialising with the non-Muslims and there has been a noticeable decline in mixed social gatherings.²⁵⁶ A. Vaithilingam, President of the Malaysian Hindu Sangam confirmed this and added that at one time, government offices used to have joint celebrations of *Deepavali*, *Hari Raya*, Christmas, and Chinese New Year, but that these were discontinued since the 1970s when religious teachers (*ustads*) were invited to address such occasions.²⁵⁷

Islam accepts pluralism and there is supportive evidence in the Qur'ān on coexistence, interaction and peaceful relations among Muslims and non-Muslims. The Sharī'a also recognises for non-Muslims the freedom to practice their own laws and traditions in the sphere of personal law and customary practices. A pluralist society is not necessarily an obstacle to harmonious inter-ethnic relations, but pluralism becomes problematic when it takes the form of communalism.²⁵⁸

Haridas has added to his analysis that issues relating to citizenship and "positive discrimination" based on economic justice need to be re-evaluated so as to ensure fair and equal treatment for non-Muslims in Malaysia.²⁵⁹

256 Schumann, "Christians and Muslims", p. 264; Mutalib, *Islam and Ethnicity*, p. 164.

257 Ahmad Yousif's interview with Vaithilingam in Kuala Lumpur, July 25, 1997; Yousif, *Religious Freedom*, p. 165.

258 Cf. Mutalib, *Islam and Ethnicity*, p. 162.

259 Haridas, "Islamisation", in ed. Norani Othman, *Nation State*, pp. 100-102.

As noted above, these issues also feature in the MCCBCHS circular that bore the title "Why MCCBCHS Rejects the Application of the Sharī'a on non-Muslims?"²⁶⁰ The thrust of this seven-page letter is on the desire of the non-Muslim communities not to have the Sharī'a laws imposed on them, adding that the existing legal regime "where we can have recourse to the civil courts as equals before the law" should be maintained. The circular speaks of unity in diversity and respect for religious beliefs of all the adherents of various religions in Malaysia. It is, however, critical of the fact that "the subject, 'Islamic Civilization' has become compulsory for all tertiary students in the state". The circular is not altogether based on factual evidence especially in parts where it stated that "the Government is streamlining our Civil Law in accordance with the Sharī'a", or when it says on the same page (page 1) that "PAS publicly proclaims that its intention is to make Malaysia an Islamic state". The statement then reads "The MCCBCHS rejects categorically (and this we have time and again declared publicly) the application of the Sharī'a on us, non-Muslims" (page 2). It is further stated: "If under the moderate domination of UMNO, we are already experiencing discriminations, what more, if Malaysia becomes an Islamic state"? Although the statement referred to "streamlining of Civil Law in accordance with the Sharī'a", this has not happened, in fact, and the apprehensions that are based on PAS's prospects of building an Islamic state are also theoretical. This is borne out perhaps by the self-same circular which reads in part:

260 The MCCBCHS's circular letter bears no date (c. 1990) and it is marked for "private circulation only".

We have been and are happy with the present state in which we can have recourse to the civil courts ... We are also happy that each religious group is able to follow, strictly, its own religious laws, which are peculiar to each religion.²⁶¹

In his 1998 publication on religious freedom and the minorities in Malaysia, Ahmad Yousif has also confirmed that:

On the whole, it was shown that the majority of religious minorities in Malaysia are relatively satisfied with the level of religious freedom they have. Each ethno-religious community is able to adhere to its own particular forms of worship, carry out its own special festivals, establish its own religious institutions ... as well as educate its youth in its respective tradition.²⁶²

Dr. Tan Chee Khoon, a former member of Parliament has responded to the apprehensions of non-Muslims about the possible formation of an Islamic state in Malaysia and thought that these were mainly unfounded: "I don't think it will happen in our country, not during my lifetime, at least." He added that such a state can exist in the Middle East where Muslims are leaders in government. Dr. Khoon acknowledged that "many non-Malays and non-Muslims talk about this matter" but added that much of their apprehensions are due to "lack of knowledge and lack of reassurance from the powers that be on what these mean to their position and well-being in this country. What the Islamic tide in Malaysia means to them has not yet been well-explained."²⁶³

261 MCCBCHS Circular, p. 2.

262 Ahmad Yousif, *Religious Freedom*, p. 191.

263 Mutalib's interview with Dr. Tan Chee Khoon in Mutalib, *Islam in Malaysia*, p. 101.

A former Acting President of MCA, Lee Kim Sai, stated in an interview that "In general Islam is not a problem to non-Muslims in Malaysia. For a long time we all have come to know its importance to the Malays. So, we respect the wishes of the Malays." Kim Sai then added that "however, Islam in the hands of extremists and fundamentalists must be controlled." With reference to the Islamic state, Kim Sai stated that "we hope it will never happen. Our constitution, as our legal people tell us, will not allow it to happen. Ours is a democratic country and every religion has a place in it. This will change if we have an Islamic state." Kim Sai expressed that the Chinese community did not necessarily object to the Islamic revival in Malaysia if it did not involve a great deal of change. "But if it changes so many things and affects our business and our lives, we wouldn't like it."²⁶⁴

Husin Mutalib's several interviews with non-Muslim leading figures of Malaysia in the early 90s led him to the conclusion that "in general, their views about Islam, Islamisation, and the Islamic state are not positive," notwithstanding the Prime Minister's (Dr. Mahathir) repeated assurances to allay their apprehensions about the Islamic revival in Malaysia. Mutalib has explained these apprehensions to be due mainly to the following four factors.

Firstly, Islamisation in Malaysia tends to have an ethnic-cultural bias in that it gravitates towards a greater sense of 'Malayness' in terms of promoting Malay ethnic demands and interests. The non-Malays perceive this as a dilution of their own rights and interests. Islamisation in general and an Islamic state in particular is equated with greater political control of the country by Malays.

264 Id., pp. 102-103: (Lee Kim Sai's interview with Mutalib).

Secondly, in the economic sphere, greater emphasis on Islamisation is seen to diminish the traditional domination of the Chinese in the national economy. The New Economic Policy (NEP) of Malaysia launched in 1970 and completed in 1990 promoted greater Malay participation in the economy and opened new avenues and opportunities to the Malays and Bumiputeras relative to non-Malays. One aim was to increase the share of economic wealth held by Malays from 2.4 per cent to 30 per cent of the total, although they constituted 56 per cent of the population. At the same time, the non-Malay share was to be increased from 34.3 per cent to 40 per cent while the share held by foreigners was to be reduced from 63.3 per cent to 30 per cent. Dr. Mahathir wrote that "the twenty years of NEP ended in December 1990, and by any measure the policy has been a resounding success"²⁶⁵. The National Development Policy (NDP) which followed the NEP enhanced the tendency of giving greater assistance to the *Bumiputera* although a more liberal approach has been adopted in the matter of ethnic participation. The NDP was basically a continuation of the NEP. As the twenty years of the NEP drew to a close, it was decided to continue the work for another ten years within the framework of a National Development Policy. It was hoped that by the end of the century "the economic disparities between the races would have been largely eliminated." The NDP focused more on "the quality of economic development than on quantity" and it has shown encouraging results despite the economic crisis that hit the region in the summer of 1997.²⁶⁶

Thirdly, the government's many assurances to the effect that Islamisation will not change the constitutional rights of

265 Dr. Mahathir, *A New Deal for Asia*, p. 35.

266 Id., p. 36.

non-Malays have not been effective and were "not found convincing by many non-Malays." Their anxiety has been due to lack of clear discussion, especially in view of the zealous pursuit of officials in many states of the federation of Islamisation activities, and the declaration by some states, in 1989 for instance, that *khalwat* (intimate proximity between members of the opposite sexes) laws and morality issues were to apply generally to include non-Muslims.

Fourthly, given the exposure of the Malaysian public to numerous reports about unrest, war and revolutions in other Muslim countries, it became difficult to convince the non-Muslims of Malaysia that greater Islamisation will improve their lives better than they are at present. Non-Muslims are as a result vulnerable and view Islamisation activities with suspicion.²⁶⁷

The former Deputy Prime Minister, Anwar Ibrahim, took a broad view of Islamisation in Malaysia as consisting of moral values that are comprehensive and are therefore taken into consideration in the formulation of government policy and administration. Anwar Ibrahim then went on to add:

But in doing so, we must acknowledge the Malaysian reality of a multi-religious, multi-racial society. Therefore, Malaysian Islamisation process must take into consideration the views of both Muslims and non-Muslims. If Islamisation should bring about action which should be reflected in the development of the nation, then it is imperative that this Islamisation should be shaped by all the various religious groups in the betterment of a strong society based on good values such as upholding higher standards of morality, eradication of poverty and corruption.²⁶⁸

267 Mutalib, *Islam in Malaysia*, pp. 107-109.

268 Quoted in Basri, *Religious Tolerance in Post-Independence Malaysia*, 1988, p. 111.

Notwithstanding the attempt to equate Islamisation with the pursuit of good moral standards, government policy in Malaysia has not sought to enforce the Sharī'a as the law of the land. Despite all the general pro-Islamisation policy measures of the Mahathir government, he has made it clear that the government does not plan to make Islam into a common law of Malaysia nor to extend the Sharī'a sphere of application from personal law of the Muslims into the public law in the country. Dr. Mahathir thus explained his government's stand on the enforcement of Islamic law as follows:

What we mean by Islamisation is the inculcation of Islamic values in government. Such inculcation is not the same as implementation of Islamic laws in the country. Islamic laws are for Muslims and meant for their personal laws. But laws of the nation, although not Islamically-based can be used as long as they do not conflict with Islamic principles. Islamic laws can be implemented if all the people agree to them. We cannot therefore force them because there is no compulsion in Islam.²⁶⁹

Government policy remains, in the meantime, committed to the development of racial harmony and better understanding among the adherents of various religions. This is indicated in the establishment, for instance, of the Institute of Islamic Understanding Malaysia, commonly known as IKIM (Institute Kefahaman Islam Malaysia) which was founded in 1990 with the self-proclaimed objective that is integrated in the choice of its name. IKIM has been active in publication of books and periodicals and in organising seminars and public forums on topics of inter-religious concern.

269 Quoted in Mutalib, *Islam and Ethnicity in Malay Politics*, OUP: Singapore, 1990, p. 143.

Another concrete step taken toward the development of better understanding among the various religious groups was the proposed establishment in Selangor of a state level religious consultative council "to promote better understanding among adherents of the various religions." This was stated by the Menteri Besar of Selangor, Abu Hassan Omar who announced in January 1999 that he was happy that the "Council had been formed after more than six months of preparation. The Council, consists of permanent representatives from the Muslim, Christian, Hindu, Buddhist and Sikh communities." Abu Hassan was quoted to have said:

Being a multi-racial and multi-religious state, it is vital for the people to understand and respect one another's beliefs and culture. We do not want acts such as the burning of temples or mosques or other places of worship in Selangor. We must not allow people in Selangor to hold negative feelings or hatred for people from other religions.²⁷⁰

Abu Hassan added that the Council would be responsible for organising programmes "to promote unity among the people." The State Secretary, Hashim Meon, and four state Executive Councillors are included among the council members.²⁷¹

It should be noted that in Malaysia, Islamic law is applicable only to Muslims, and the constitutional clauses on freedom of religion are fairly comprehensive and definite. Article (11) of the Federal Constitution thus declares that "every person has the right to profess and practice his religion,

270 Report by Elan Perumal, "Religious Council Set Up in Selangor," *The Star*, Kuala Lumpur, January 9, 1999, Metro Section, p. 6.

271 *Id.*

and subject to clause (4) to propagate it". Clause (4) regulates the manner in which religious doctrines are propagated, by allowing legislation which may control or restrict the propagation of any religious doctrine among persons professing Islam. Article (11) thus safeguards freedom of religion without any stipulation in favour of any particular group, but permits restrictions to be imposed on the manner in which religious doctrines are propagated, and there are in fact restrictive laws in several states which regulate the propagation of religious doctrines.

Other aspects of religious freedom which the Constitution has addressed includes taxation which is the subject of Article 11(2) : "No person shall be compelled 'to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own". Article 11(3) says "every religious group has the right (a) to manage its own religious affairs; (b) to establish and maintain institutions for religious or charitable purposes; and (c) to acquire and own property and hold and administer it in accordance with law". Similarly Article 12(1) prevents discrimination on religious grounds in the administration of public education and scholarships. Article 12(2) gives every religious group the right to establish and maintain institutions for the education of children in its own religion.

Non-Muslims have been critical of the government policy on religious education in public schools. While Islam is taught to Muslim school children, instruction in other religions is not included in the school curriculum and can only be held outside school hours. Instead of instruction in their own particular religion, non-Muslims are required to take a course on moral education.²⁷²

272. Ackerman and Lee, *Heaven in Transition*, p. 63; Yousif, *Religious Freedom*, p. 178.

The former Minister of Education, Anwar Ibrahim, proposed, in December 1990, to introduce a course on Islamic civilization, culture and morality as a compulsory subject in all educational institutions at both the school and university levels. There was opposition from non-Muslims, but the Chinese leader and statesman, Tan Chee Khoo, supported the idea and thought it would be good if non-Muslims were better informed about the country's official religion. However, he thought it would be a non-examination subject. Opposition mounted when the course on Islamic civilization and morality was being imposed as an examination course.²⁷³

In 1997 the Cabinet decided to introduce a new course in all institutions of higher learning on "Islamic and Asian Civilizations." The MCCBCHS response was favourable, if the course was truly offered from a multi-civilizational perspective. Its General Secretary, Thiaraja, expressed concern, however, that the Islamic civilizational part would have religious content whereas the Asian civilisational part would not. The MCCBCHS has also expressed the view that school children should be given instruction in their own religions in all schools in the country.²⁷⁴

The constitutional provision, in Article (150) permits legislation during emergency, and legislation against subversion under Article (149), but it is provided that such legislation may not interfere with the freedom of religion, and may not interfere with the legislative powers of the states with regard to Islamic law. Religious rights are thus given primacy as they must remain unencumbered even in emergency situations and where the security of the state itself may be at risk.²⁷⁵

273 Vasil, *Tan Chee Khoo: An Elder Statesman*, p. 53.

274 Cf. Yousif, *Religious Freedom*, pp. 178-179; Muzaffar, "Islamic And Asian Civilization Course," *JUST*, No. 1, (July 97), p. 3.

275 Cf. Andrew Harding, "Islam and Public Law in Malaysia", in Chibli Mallat, ed., *Islam and Public Law*, p. 199.

The Supreme Court has, in two leading cases at least, upheld the constitutional clauses on religious freedom. In one of these cases, Jamaluddin Othman, a Malay Muslim, converted to Christianity and became a priest under a new name, Yeshua Jamaluddin, and proselytised Christianity among the Malays. He was detained under the Internal Security Act in 1987, but his plea for release on a *habeas corpus* application was eventually granted by the Supreme Court. The Supreme Court held that the ISA could not be used so as to override the defendant's freedom to choose and propagate his religion.²⁷⁶

The main issue in the landmark case of Susie Teoh was conversion of minors. The facts of the case were as follows: in April 1985, Susie Teoh, a Chinese girl of seventeen, went missing from her home in Terengganu, Malaysia. Subsequently the Kadhi of Pasir Mas in the neighbouring state of Kelantan informed Susie's family that she had converted, of her own free will, to Islam in December 1985 when she was 17 years and 8 months. Her father, Mr. Teoh Eng Huat, a labourer, who had brought her up as a Buddhist, protested against his daughter's conversion and consequently sued the Kadhi for violation of his rights to decide Susie's religion, upbringing and education.²⁷⁷

Abdul Malek J., delivered judgment in May 1986 and granted the declaration regarding Susie Teoh's upbringing and education under the provisions of Kelantan's Family Law Enactment 1983 and the Guardianship of Infants Act 1961. The issue of conversion was, however, argued by reference to Article 11(1) of the Constitution which says that 'everyone has

276 *Minister for Home Affairs v. Jamaluddin bin Othman* [1989] 1 MLJ 369, 418.

277 *Teoh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* [1986] 2 MLJ 228.

the right to profess and practice his religion ...". The age of the person was held to be irrelevant provided the person was of sound mind and fit to decide. Moreover, Article 12(3) provided that "No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own", and that "the religion of a person under the age of eighteen years shall be decided by his parent or guardian" (Art. 12.4). The learned judge decided that the age of majority under article (12) did not apply to Article (11). Susie's freedom to choose her own religion was therefore upheld, and Mr. Teoh's right to decide Susie's religion was overruled.

Mr. Teoh then appealed to the Supreme Court. In April 1990, the Supreme Court issued judgment on Mr. Teoh's appeal and held that a person of less than 18 years does not have a constitutional right to choose his own religion: "In the wider interest of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian". The judgment might have compromised the rights of young person's to religious freedom, but it was politically prudent and protective of inter-communal harmony in Malaysia. Writing in 1991, Andrew Harding observed the following: "Currently there are fears that Islamic law will be extended to non-Muslims; but the Susie Teoh episode does not indicate that such a policy will be followed. The peace and prosperity of Malaysia has depended on a balance of forces in which the law has clearly played an important part".²⁷⁸ Freedom of religion is guaranteed in the Constitution as evidenced in Susie Teoh's case, and Jamaluddin bin Othman's case. In view of these

278 Andrew Harding, "Islam and Public Law in Malaysia", p. 204.

cases, as well as Art (150) of the Constitution, freedom of religion is accorded a higher constitutional status than other rights.

The leader of the Malaysian delegation to the UN Commission on Human Rights, Musa Hitam, noted in an interview on the 50th anniversary of the Universal Declaration of Human Rights that the subject of religious beliefs and their practice has always provoked emotions and sensitivities. The UDHR poses no problem in the acceptance of religious differences, but he added on a general note that "there exist quite a number of intra-religious restrictions that the authorities concerned have to apply."²⁷⁹ Francis Loh has commented that the federal constitution accords Islam a special position as the official religion but it also grants others the freedom to practice their own religious beliefs. Non-Muslims have enjoyed this freedom in Malaysia and continue to hold important positions in politics, the economy and society at large. "However, following the Islamic resurgence movement and Islamisation policies beginning from the 1970s, non-Muslims have complained it has become more difficult for them to practise, profess and propagate their faiths." Francis Loh then added that these concerns have been voiced by the Malaysian Consultative Council for Buddhism, Christianity, Hinduism and Sikhism sometimes advocating compromises that are acceptable to the various parties concerned.²⁸⁰

With reference to the early history of migration, Chandra Muzaffar, himself a convert to Islam, noted that the Malays

279 Quoted in *The Star* daily of Kuala Lumpur's feature article on the Universal Declaration of Human Rights entitled "A Code of Conduct for All," December 10, 1998, Section 2, p. 4.

280 Id.

have acted with openness and tolerance toward the new immigrants through liberal conferment of citizenship rights to them so much so that they reduced their own status "from a nation to a community: this...is one of the greatest concessions that any indigenous people have made to non-indigenous communities"²⁸¹ Muzaffar is somewhat critical of non-Muslims in that since Merdeka hardly "any non-Muslim scholar, theologian, journalist, politician, or social activist has made it his mission to reduce the negative perceptions of Islam within the non-Muslim communities in the country". It is then added that "As Islam becomes more and more important in the life of the nation in the future, these negative attitudes towards the religion could emerge as a formidable barrier to inter-ethnic harmony".²⁸² Haridas has also observed that much of what has been said or done under the name of Islamisation "has made its own regrettably negative contribution," and that consultation between Muslim ulema, "especially those of a more progressive outlook" and non-Muslim religious leaders remains minimal.²⁸³

Anwar Ibrahim has observed that "relations between Muslims and non-Muslims must be governed by moral and ethical considerations. The seeds of militancy are everywhere and each community must ensure that they do not germinate and multiply through discontent and alienation".²⁸⁴ Anwar Ibrahim added that the wave of Islamic revivalism presents the Muslims and people of other faiths with the challenge to "articulate their moral vision and intensify the search for

281 Chandra Muzaffar, "Tolerance in the Malaysian Political Scene", p. 123.

282 *Id.*, p. 146.

283 Haridas, "Islamisation of State and Society", in ed. N. Othman, *Shari'a Law and the Modern Nation-State*, p. 101.

284 Anwar Ibrahim, *The Asian Renaissance*, p. 123.

common ethical ground", which should guide and direct their energy potential toward unity in diversity and prevent them from "blind fanaticism which could precipitate into violent clashes with other cultures".²⁸⁵ It is then added that successive Muslim leaders in Malaysia have always emphasised economic and social development through a *modus vivendi* with the non-Muslim minority in the country. Extremism in all forms must be wholly repudiated, for every community has a shared responsibility with others to ensure continuity of the climate of tolerance in the country.²⁸⁶

Dr. Mahathir has emphasised the peaceful side of Islam when he commented that "The fundamentals of Islam are based on peace. Indeed Islam means peace".²⁸⁷ There is "a misunderstanding among Muslims regarding the teachings of Islam on relations with non-Muslims The Qur'ān clearly stated that the Christians are the friends of the Muslims".²⁸⁸ Dr. Mahathir has spoken positively of the overall pattern of the Muslim-non-Muslim relations in Malaysia by drawing attention to the fact that Malaysia has a Muslim majority and the Government is Muslim dominated. "Although the Muslims have sufficient majority to rule the country on their own, they have chosen not to do so. Instead they deliberately chose to share power with the non-Muslim minorities".²⁸⁹ This he added has borne fruit and Malaysia is "peaceful, stable and prosperous, growing at eight per cent per annum for almost ten years". The Muslims of Malaysia have proven themselves capable of living and working with non-Muslims to

285 Id., p. 124.

286 Id., p. 119-123.

287 Dr. Mahathir Mohamad, *Islam the Misunderstood Religion*, p. 26.

288 Id., p. 12.

289 Id., p. 24.

"create a united and progressive nation".²⁹⁰ Another commentator has spoken of Malaysia as "a classic example of cultural as well as religious pluralism" where the focus is not only on religion but that "the rights to equality and rights of language and education are of as great importance as those relating to religion".²⁹¹

In conclusion, it may be said that notwithstanding the difficulties that have underlined its history of ethnic relations and religion, Malaysia has nevertheless enjoyed peace and prosperity over a period of decades, and this now represents an added factor that tends to favour the existing *status quo* for the foreseeable future.

290 *Id.*, p. 24.

291 Andrew Harding, "Islamic Law in Malaysia", p. 70.

CHAPTER TEN

Apostasy (*Riddah*)

Apostasy became a topical issue in Malaysia following the case of NorAishah Bokhari, a 26-year-old Malay Muslim who became an apostate when she renounced Islam in October 1997. She did so as to be able to marry Joseph Arnold Lee, 28, a Roman Catholic of Chinese-Indian parentage from Melaka. Lee worked as an Assistant Manager in a Citibank branch in Melaka where NorAishah also worked as a junior staff. In September 1997 they decided to be engaged. "The only difference for this couple" according to a newspaper report "was that this time, instead of the non-Muslim deciding to embrace Islam, the Muslim decided to leave the religion".²⁹²

On 22 October NorAishah renounced Islam in the presence of a Commissioner of Oaths. She then left her parental home to live with her fiancé's parents. NorAishah's own family and relatives were "saddened and shocked" with her renunciation of Islam just as it angered certain quarters of the Muslim community to see what they considered to be a

292 R. Mageswary, "Two Young People from Two Different Religions Met and Fell in Love with Tragic Consequences", *Sun Magazine Special*, Kuala Lumpur, 16 April 1998, p. 6.

violation of the mores of Muslim society in Malaysia.

The Islamic party of Malaysia (PAS) printed and circulated some 100,000 posters bearing NorAishah's photo and urging her to return to Islam. Its official newspaper, *Harakah*, called on the government to consider arresting apostates under the Internal Security Act which allows for detention without trial. This is due mainly to the constitutional guarantee on freedom of religion. Article (11) of the Constitution thus declares that "every person has the right to profess and practice his religion and, subject to Clause (4) to propagate it". Clause (4) regulates the manner in which religious doctrines are propagated, by allowing legislation, which may control or restrict the propagation of any religious doctrine among persons professing Islam. Article (11) thus safeguards freedom of religion without any stipulation in favour of any particular group, but permits restrictions to be imposed on the manner in which religious doctrines are propagated. Change of religion and apostasy cannot be the subject of detention, hence the suggestion to use the Internal Security Act for that purpose.

In November 1997 NorAishah's family found her and brought her home. Her father, Bokhari Mohamed Tahir, subsequently told reporters that his daughter had regretted her actions and vowed to revert to Islam. "I asked my daughter why she left Islam", Bokhari told reporters at his home in Pontian. "She said she is not sure but she has started reading the Qur'ān and is more devout than ever". On December 30, 1997 she disappeared again.

"My daughter has been kidnapped", a tearful Bokhari told reporters this time. Two weeks after she disappeared, a letter was received by her lawyer which bore her signature, asking her lawyer to appeal to the High Court on her behalf for her right to choose her own religion. In this 20-page letter,

dated January 9, 1998, NorAishah tells the High Court that she was kidnapped by her father, and brother (Nazaruddin) while waiting in front of the Amoda building in Kuala Lumpur on November 20. But later in the evening she called Lee who then waited for her in front of their house and they both went into hiding. In her affidavit, NorAishah urged the court to look into her case. She also asked her community and the media to leave her and Lee alone. A warrant of arrest has, in the meantime, been issued against Lee for kidnapping NorAishah, and her lawyer Leonard Teoh, was detained by police soon after his submission of the 20-page letter and affidavit. Teoh apparently knew the whereabouts of the couple but refused to divulge it. The High Court in Johor Bharu ruled that the solicitor-client privilege does not exist where there is an element of fraud, and said that the NorAishah case contained an element of fraud, and therefore Teoh must reveal whereabouts of the missing couple. The Bar Council was considering taking up the matter. Teoh spent fourteen days in remand but was released without being charged.²⁹³

Unconfirmed reports also had it that a draft bill was being prepared by the Islamic Centre (Pusat Islam) at the Prime Minister's Department, which contained punitive measures and provisions for a rehabilitation programme for prospective apostates. It was in response to such reports that the Minister of Religious Affairs at the Prime Minister's Department, Dr. Abdul Hamid Othman, said that a law on apostasy is being drafted but it would focus on rehabilitative and preventive measures. "The law will not be punishment-oriented but would lay emphasis on how to prevent apostasy and handle reported cases".²⁹⁴ The

293 *Id.*, p. 8.

294 Mazlan Nordin, "Things that People Do in the Name of Religion", *New Straits Times*, Kuala Lumpur, 5 June 1998, p. 12.

present writer's personal information suggested that an initial plan for a punitive approach was discussed at the Technical Committee at Pusat Islam but failed to find support and the Committee opted instead for a persuasive approach to the proposed legislation. The Minister Hamid Othman announced that the Committee "which was formed three years ago comprises legal and religious experts, sociologists and politicians" He added that the Committee has been given the mandate to formulate a draft law on apostasy. "First, we have to identify whether apostasy is a social or a religious problem. Only then can we formulate the law which suits Malaysian society."²⁹⁵

The Muslim Youth Movement of Malaysia (ABIM) President, Ahmad Azam Abdul Rahman commented that apostasy is a sensitive issue among the Muslims of Malaysia which needs to be handled carefully as it can otherwise affect stability and communal harmony in the country. He said concerning NorAishah's case "I hope that there are no local and foreign parties taking advantage of the situation here by testing the strength of our legal system ... we believe that some are intervening in this issue through the Internet." Ahmad Azam added "we feel that there are elements of deception where NorAishah might have been tricked by a group and taken away from her family, religion and society." Ahmad Azam said that in an affidavit purportedly written to her family, NorAishah included a copy of the letter to her lawyer which stated "... please ensure that my letter is published in our Malaysian and international media for the people to know what is actually going on in our country." According to her family members who were present at a press conference on the

295 Hizreen Kamal and Rohani Ibram, "Panel to Examine Laws on Apostasy: Hamid," *The Star*, January 26, 1998, Section 2, p. 6.

issue, the "letter was not characteristic of NorAishah's thinking."²⁹⁶

Another observer wrote that "despite its harmful consequences, few states seem concerned enough to regulate the offence of apostasy among the Muslims at present." Measures that are taken are on the whole inadequate, and there is a need that the federal constitution should clarify the position and enable the legislative body to take initiative in the matter.²⁹⁷

A question has also been raised concerning NorAishah's case as to whether the High Court had the jurisdiction, in view of the Article 121 (A) of the federal constitution, to entertain this case in the first place. It has been pointed out that NorAishah renounced her religion through a deed poll and sought a declaration by virtue of Article (11) of the constitution on freedom of religion. According to one observer "a deed poll is not sufficient to renounce Islam. It is the decision of the relevant state Islamic authority that determines the matter."²⁹⁸ What this means is that NorAishah Bukhari would be required to make a statutory declaration before a *qāḍī* to enable her to be free of various religious obligations.

Apostasy is a serious offence under classical Islamic law and the leading schools of *fiqh* have adopted as standard law the ruling of the hadith which declares simply that "one who changes his religion shall be killed". But the issue of death punishment for apostasy is controversial, especially in view of the Qur'ānic declaration that "there shall be no compulsion in

296 *Id.*

297 Letter to the Editor, "Flex the Law to Fight Apostasy," *The Sun*, Kuala Lumpur, May 3, 1998, Section 2, p. 9.

298 *The Sun* correspondent's interview with Dr. Mohamed Deen, Kuala Lumpur, April 16, 1998, p. 6.

religion" (al-Baqarah, 2:256). This is endorsed in a number of other places in the Qur'ān:

- "Those who accept the faith and then disbelieve, then accept the faith again and then disbelieve again, and then increase in their disbelief, will not be forgiven by God nor be guided by Him. (al-Nisā', 4:137).

إِنَّ الَّذِينَ كَفَرُوا ثُمَّ آمَنُوا ثُمَّ كَفَرُوا ثُمَّ أَرَادُوا
كَفْرًا لَّيْسَ مِنَ اللَّهِ لِيَغْفِرَ لَهُمْ وَلَا يَهْدِيَهُمْ سَبِيلًا .

- "If God had willed, everyone on the face of the earth would have been believers. Are you then compelling the people to become believers?" (Yunus, 10:99).

وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مِنَ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا
أَفَأَنْتُ تُكْرِهُ النَّاسَ حَتَّى يَكُونُوا مُؤْمِنِينَ .

- "Let whosoever will believe, and whosoever will disbelieve" (al-Kahf, 18:29).

فَمَنْ شَاءَ فَلْيُؤْمِنْ وَمَنْ شَاءَ فَلْيُكْفِرْ .

- "Unto you your religion, and unto me my religion" (al-Kāfirūn, 109:6).

لَكُمْ دِينُكُمْ وَلِيَ دِينِ .

- "And if one among the disbelievers seeks your protection, then protect him so that he may hear the word of God" (al-Tawbah, 9:6).

وَإِنْ أَحَدٌ مِنَ الْمُشْرِكِينَ اسْتَجَارَكَ فَأَجِرْهُ حَتَّى يَسْمَعَ كَلِمَةَ اللَّهِ .

The Qur'ān obviously maintains that faith must be through conviction and that religion which is induced by

compulsion is meaningless. It is evidently difficult to uphold the normative Qur'ānic principle on freedom of religion and the provision, at the same time, of death punishment for apostasy. The Qur'ān prescribes absolutely no temporal punishment for apostasy, nor has the Prophet, peace be on him, sentenced anyone to death for it. Instances of death punishment that have been recorded in some cases were cases of blasphemy and treason and not of apostasy through belief and conviction. In an attempt to reconcile these positions, it may be said that the hadith in question envisaged only a hostile renunciation of the faith which was, in the early days of Islam, equivalent to high treason. The punishment was, in other words, meant, not for apostasy that emanated from conviction and belief, but for blasphemy and rebellion against the community and its legitimate leadership.²⁹⁹ Muslim jurists have, however, ignored this circumstantial aspect of apostasy, and the Qur'ānic evidence quoted above, and made apostasy punishable by death. Some jurists have also acknowledged that apostasy may be punished by the discretionary *ta'zīr* punishment, which may consist of imprisonment, flogging, public disclosure, admonition and fines. If one takes the latter view, it would mean that the legislative power of the Muslim community may enact a law and determine the legal position concerning apostasy. In Malaysia, it may be noted, that the death sentence can only be passed by the High Court. The Syariah Court has no such powers. Since apostasy normally comes under Syariah Court jurisdiction, death punishment for apostasy cannot apply in Malaysia. The Syariah Court cannot proceed on the matter without an enabling law either, simply because of the constitutional clause on freedom of religion.

299 For details see the chapter on blasphemy in M.H. Kamali, *Freedom of Expression in Islam*, Cambridge: The Islamic Texts Society, 1997, pp. 212-250.

There is, in other words, a need for legislation to address these matters and determine whether or not apostasy is a punishable offence at all, and if so, what sort of sanctions and procedures may be invoked.

Notwithstanding the clear constitutional guarantee on freedom of religion, the pressure of public opinion strongly discourages apostasy among Muslims in Malaysia. The Islamic party of Malaysia, PAS, in its controversial Hudud Bill 1993, has included apostasy among the prescribed (*hudūd*) offences and assigned the death punishment to it. As noted above, the Hudud Bill was passed by the State Legislature of Kelantan but the Federal Government refused to ratify it and it has consequently remained in abeyance.

As noted earlier that the Supreme Court has, in a leading case, upheld the constitutional clause on religious freedom. In *Minister of Home Affairs v. Jamaluddin Othman*,³⁰⁰ a Malay Muslim, converted to Christianity, and after studying at the Far Eastern Bible College in Singapore proselytised Christianity among the Malays. He was detained under the Internal Security Act 1987 "for acting in a manner prejudicial to the security of Malaysia". He was arrested under the ISA simply because it is not a crime for a Malay to convert out of Islam under Malaysian law. But his plea for release on a *habeas corpus* application was eventually granted by the High Court of Kuala Lumpur. The trial judge, Justice Anuar, held that the Minister of Home Affairs had detained the defendant contrary to Article (11) of the Constitution, and ordered the defendant's release. The Minister appealed to the Supreme Court, which dismissed the appeal and stated the grounds of its decision as follows:

300 [1989] 1 MLJ 369, 418.

The sum total of the grounds for detention in this case was the supposed involvement of the respondent in a plan or programme for the dissemination of Christianity among the Malays ... We do not think that mere participation, meetings and seminar can make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it were true, it cannot by itself, in our opinion, be regarded as a threat to the security of the country.

While dismissing the appeal the Supreme Court also held that the guarantee provided by Article (11) of the Constitution concerning freedom of religion must be given effect unless the actions of a person go well beyond what can normally be regarded as professing or practising his or her faith.

The issue of jurisdiction over apostasy cases received further attention in the case of *Soon Singh A/L Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) & Jabatan Agama Islam Kedah*,³⁰¹ the appellant Soon Singh filed an originating summons at the High Court of Kuala Lumpur, for a declaration that he is not a Muslim. The High Court declared conversion to Islam of the appellant at the age of 17 years and four months to have been invalid because he was still under 18 years of age at the time. In deciding this the court cited in authority the Supreme Court decision in the case of *Teoh Eng Huat v. Kadhi Pasir Mas* [1990] 2 MLJ 300 as discussed above. The court also decided that the jurisdiction for apostasy cases belongs to the Syariah Court, within the meaning, that is, of Article 121(A) of the constitution.

301 High Court of Malaya, Kuala Lumpur, Suit No. R2-24-76, 1992.

The facts of the case were that the appellant was born to Sikh parents in Butterworth in 1971, and, went to school at the Sekolah Menengah Dato Sheikh Ahmad, Arau, Perlis in 1984. He was converted to Islam, without the knowledge or consent of his parents, at the PERKIM office in Alor Star on 14th May 1988 and was given the name Salman bin Abdullah. On 16 July 1992 the appellant went through a Baptism ceremony into the Sikh faith at the Sikh Gurdwara in Kuala Lumpur at the age of 21 years and six months. He consequently executed a deed poll and declared himself to be a Sikh, not Muslim, and also that he had reverted to his original name.

The High Court addressed the preliminary issue raised by the Counsel whether the High Court had jurisdiction to make the declaration prayed for. The learned Judge referred to the case of *Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam*,³⁰² and concluded that a Muslim who renounces the Islamic faith by a deed poll and goes through a Baptism ceremony according to the Sikh faith remains a Muslim until a declaration has been made in a Syariah Court that he is a "*murtad*."

On the facts of the appeal, the conversion of the appellant while he was a minor and without the knowledge of his parents, was declared invalid. While referring to *Teoh Eng Huat v. Kadhi Pasir Mas*, the court held that the question of jurisdiction was not raised in that case, it was nevertheless held that "the subject-matter of this application comes within the jurisdiction of Syariah Courts. In declaring this, the court relied on Article 121(1A) of the constitution.

There is a total legislative vacuum concerning apostasy in Malaysia as there is no written law, statute, State Enactment or

302 [1992] 1 MLJ 1.

Federal Territory Act that would apply to a Muslim who renounces Islam. Nor is there any law to determine whether such a person can be arrested or detained for any purpose, whether punitive or solicitation of repentance, let alone a specific procedure for adjudication and sentencing of persons who do not repent. Apostasy thus remains unregulated, and NorAishah's case, as one commentator observed "has brought to light yet again the inadequacy of laws on the matter of apostasy."³⁰³

The 1988 amendment to Article 121 of the federal constitution may or may not be of much help with regard to apostasy. For the amendment in question simply declared that the civil courts shall have no jurisdiction "in respect of any matter within the jurisdiction of the Syariah Courts."

In the case of *Mohd. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur*,³⁰⁴ where the plaintiff alleged that he had established himself as an apostate through a "deed poll" the Kuala Lumpur High Court, presided by Abdul Kadir Sulaiman J held on November 5, 1997 that despite the absence of a specific state legal provision on the matter of apostasy "the jurisdiction of the Syariah Court is much wider than what has been expressly conferred upon it by the respective state legislature."

The learned judge has thus held that the absence of enabling state law to confer jurisdiction on the Syariah Court in apostasy matters does not necessarily mean that the matter falls automatically under the civil court jurisdiction. This may be said to be in line with the case of *Mohammad Habibullah v. Faridah Datuk Talib*,³⁰⁵ where Gunn Jit Tuan J, with

303 Cf. Ahmad Faiz Abdul Rahman, "Malaysian Laws on Apostasy Inadequate," *The Star*, Kuala Lumpur, February 10, 1998, p. 16.

304 Reported in *The Star* article in the previous reference.

305 [1992] 2 MLJ 793.

Mohamed Azmi J. cooccurring, held that "in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the Syariah Court."

Notwithstanding some attention that apostasy has received in these and similar other cases, apostasy remains basically unregulated and incidental references of the kind that are seen in these cases are not enough to overcome the basic constitutional question of whether or not penalising apostasy will be *ultra vires* the constitutional clause on freedom of religion. Even if one reaches the conclusion that the Syariah Court ought to have jurisdiction to determine issues pertaining to religious offences, the absence of particular laws to determine matters of free will, or the absence of undue influence or coercion, and the nature of any sanctions to be applied may prove problematic.

A Brief Analysis of the Sharī'ah Evidence

The hadith which proclaims "whoever changes his religion shall be killed" is a general proclamation (*'āmm*) which is in need of specification (*takhṣīs*). For, in its general form, it would apply equally to cases that evidently fall outside its intention, as it would render this same punishment applicable not only to Muslims but to followers of other religions who may convert to Islam. Al-Shawkāni has also added a second point of interpretation concerning the meaning of this hadith: the manifest meaning of this hadith has been restricted, on the authority of the Qur'ān (al-Nahl, 16:106) so as to exclude a person who changes his religion outwardly under duress but remains faithful otherwise.³⁰⁶

306 Al-Shawkāni, *Nayl al-Awṭār*, Vol. VII, p. 219.

Moreover, the Hanafis have restricted the general meaning of this hadith in yet another respect, namely, that a woman apostate is not punished by death but only by imprisonment. This is because the masculine pronominal suffix alone occurs in the wording of the hadith, which gives rise to an element of doubt concerning its application to women.

According to the rules of interpretation, as expounded in *uṣūl al-fiqh*, once the general meaning of a decisive (*qaṭʿī*) text has been specified in some respect, the part that remains unspecified becomes speculative (*ẓannī*), and as such, is open to further specification and interpretation. It is then suggested that the hadith in question may be specified further to say that the death penalty therein may be reserved only for apostasy which is accompanied by high treason (*hirābah*).³⁰⁷

The preceding analysis is also extended to the second hadith often quoted in support of the death punishment for apostasy, wherein the Prophet said:

The blood of a Muslim who professes that there is no god but Allah and that I am His Messenger is sacrosanct except in three cases: a married adulterer, a person who has killed another human being, and a person who has abandoned his religion, while splitting himself off from the community (*al-tārik li-dīnīhi mufāriq li'l-jamā'ah*).³⁰⁸

As will be noted, this hadith makes clear that the apostate must also boycott the community (*mufāriq li'l-jamā'ah*) and challenge its legitimate leadership, in order to be subjected to the death punishment.³⁰⁹

307 Cf. Kamali, *Freedom of Expression in Islam*, p. 96.

308 Muslim, *Mukhtasir Ṣaḥīḥ Muslim*, p. 271, hadith no. 1023.

309 Cf. El-Awa, *Punishment*, p. 52.

The Qur'ān specifies a three-fold punishment for high treason (*hirābah*), culminating in crucifixion and death (al-Mā'idah, 5:34). In an attempt to reconcile the terms of the preceding hadith with the Qur'ān, Ibn Taymiyyah observed that the crime referred to in the hadith under discussion is that of *hirābah* and not apostasy (*riddah*) as such.³¹⁰ This observation is again supported by the fact that the Prophet never put anyone to death for apostasy alone. Indeed, there were cases when certain individuals apostasised after professing Islam, yet the Prophet did not penalise them, let alone condemn them to death. Affirmative evidence on this point is found also in the following hadith which appears in the hadith compilations of al-Bukhāri and Muslim:

A Bedouin came to the Prophet, peace be on him, and pledged his allegiance to him. The next day he came back, ill with fever and said repeatedly: 'Return my pledge to me,' but the Prophet refused - thrice. Then the Prophet said: Medina is like a bellows which rejects its dross and recognises its pure.³¹¹

This was a clear case of apostasy, in which the Prophet made no reference to any punishment at all, and the Bedouin, despite his persistent renunciation of Islam was left to go unharmed. This may also be said to be in complete harmony with the Qur'ānic text, which provides, once again, a strong argument against death penalty for apostasy:

Those who believe, then disbelieve, then believe again, then disbelieve, and then increase in their disbelief - God will never forgive them nor guide them to the path (al-Nisā', 4:137).

310 Ibn Taymiyyah, *Al-Šarīm al-Maslul*, p. 52.

311 Al-Bukhāri, *Jawābir Šaḥīḥ al-Bukhāri*, p. 150, hadith no. 229.

The implication is unmistakable. The text would hardly entertain the prospect of repeated belief and disbelief if death were to be the prescribed punishment for the initial act. It is interesting to note that the initial reference to disbelief is followed by further confirmation of disbelief and then "increase in disbelief". One might be inclined to think if the first instance of apostasy did not qualify for capital punishment, the repeated apostasy might have provoked it – had such a punishment ever been intended in the Qur'ān.

A number of prominent ulema across the centuries have subscribed to the view that apostasy is not a punishable offence. Ibrāhīm al-Nakha'i (d. 95/713) a leading jurist and traditionist among the generation succeeding the Companions, and Sufyān al-Thawri (d. 161/772), who is known as 'the prince of the believers in hadith' (*amīr al-mu'minīn fī'l-ḥadīth*) and is author of two important compilations of hadith, namely *al-Jāmi' al-Ṣaḡhīr* and *al-Jāmi' al-Kabīr*, both held that the apostate should be re-invited to Islam but should not be condemned to death. They maintained that the invitation should continue for as long as there is hope that the apostate might change his mind and repent.³¹² 'Abd al-Wahhāb al-Sha'rānī has also cited the views of al-Nakha'i and al-Thawri and added that "the apostate is thus permanently to be invited to repent."³¹³ This is also the view of the renowned Ḥanafī jurist, al-Sarakhsī who held that apostasy does not qualify for temporal punishment, and there is no prescribed punishment (*ḥadd*) for it. To quote al-Sarakhsī:

312 Ibn Taymiyyah, *Al-Ṣārim al-Maslūl*, p. 321; al-Shawkānī, *Nayl al-Awtār*, Vol. VII, p. 230.

313 Al-Sha'rānī, *Kitāb al-Mizān*, Vol. II, p. 152.

Renunciation of the faith and conversion to disbelief is admittedly the greatest of offence, yet it is a matter between man and his Creator, and its punishment is postponed to the Day of Judgment (*fa'l-jazā' 'alayhā mu'akhkhar ilā dār al-jazā'*).³¹⁴

Among modern scholars, 'Abd al-Hakim Hasan al-'Īli, and Ismā'il al-Badawī have commented that by al-Nakha'i's time Islam was secure from the hostility of disbelievers and apostates. This, they maintain, indicates that al-Nakha'i understood the hadith, quoted above, which made apostasy punishable by death, to be political in character and aimed at the inveterate enemies of Islam.³¹⁵ On a similar note, Maḥmūd Shaltūt analyses the relevant evidence in the sources and draws the conclusion that apostasy carries no temporal punishment, and that in reference to this particular sin, the Qur'ān speaks only of the punishment in the hereafter:

The hadith 'one who changes his religion shall be killed' has evoked various responses from the ulema many of whom are in agreement that the *ḥudūd* cannot be established by solitary (*āḥād*) hadith, and that unbelief by itself does not call for the death punishment.³¹⁶

Shaltūt added that the key factor which determined the application of the death punishment was hostility against the believers and the need to prevent sedition (*fitnah*) against religion and state. This conclusion is sustained by the manifest meaning of many of the passages in the Qur'ān which proscribe compulsion in religion.

314 Al-Sarakhsi, *Al-Mabḥūṭ*, Vol. X, p. 110.

315 Al-'Īli, *Al-Ḥurriyyāt al-'Āmma*, p. 426; Badawī, *Da'aim al-Ḥukm*, p. 166.

316 Shaltūt, *Al-Islam*, 'Aqīdah wa Sharī'ah, pp. 292-293.

Ṣubḥi Maḥmaṣṣāni and Selim el-Awa have similarly observed that the death punishment was meant to apply, not to simple acts of apostasy from Islam, but when apostasy was linked to an act of political betrayal of the community and high treason (*ḥirābah*). The Prophet never killed anyone solely for apostasy. This being the case, the death penalty was not meant to apply to a simple change of faith but to punish acts of treason that consisted of joining forces with the enemy and sedition.³¹⁷

The late Ayatollah Mutahhari highlighted the incompatibility of coercion with the spirit of Islam, and the basic redundancy of punitive measures in the propagation of its message. He wrote that it is impossible to force anyone to acquire the kind of faith that is required by Islam, just as "it is not possible to spank a child into solving an arithmetical problem. His mind and thought must be left free in order that he may solve it. The Islamic faith is something of this kind."³¹⁸

It may be said by way of conclusion that apostasy was a punishable offence in the early years of the advent of Islam due to its subversive effects on the nascent Muslim community and state. Evidence in the Qur'ān is on the other hand clearly supportive of the freedom of belief, which naturally includes freedom to convert. Moreover, the Qur'ān provides no punishment for apostasy despite the fact that it occurs in a large number of places in the text, and this remains to represent the normative position of the Sharī'a on non-subversive apostasy that is due purely to personal conviction and belief.

317 Maḥmaṣṣāni, *Arkān*, pp. 123-124; el-Awa, *Punishment*, p. 55.

318 Mutahhari, "Islam and the Freedom of Thought," *Al-Tawḥīd*, p. 154.

CHAPTER ELEVEN

Women's Right to Work: A Shari^ca Perspective

I. Statement of the Issue

Another issue which became the focus of public and media attention in Malaysia was the announcement by the Chief Minister of Kelantan, Nik Aziz Mat, on 16 March 1999 that the PAS government would conduct a study with a view to prohibit wives from working, as in his words, "it was unfair that they should be made to work, which was the responsibility of men." He said that women should take care of the children and family and that women who tried to seek equal status with men would have to bear the consequences themselves. Nik Aziz added that he had no intention of stopping women from work, but that his primary concern was to find ways to ensure that children were not neglected while their mothers were at work. However, he questioned the need for women who worked "*secara seronok atau suka-suka*" or "just for the fun of it" but were affecting the future of their children. "Islam teaches people to get married so that mothers can look after the children." He also said he had asked some lecturers from

the Universiti Utara Malaysia to conduct a study on children as to how they were affected by their mother's preoccupation with work.³¹⁹

Nik Aziz who is often referred to as "the party's spiritual leader" was also quoted to have said that PAS had adopted a ruling which disallowed its women members to stand as candidates in elections because it could not guarantee their safety and dignity. He added that the present political scenario was not conducive for women's candidacy. This ruling would also help to prevent women from *bergeser* (coming into contact with men). For there were groups out to "disturb" women campaigners during elections. "This happened in Gong Datuk Pasir Puteh sometime ago when our supporters were surrounded by youths from another party. They (women) could not get out because they were surrounded by hundreds of youths."³²⁰ The Chief Minister added that the ruling not to allow women candidates to stand in the elections was temporary and that the party would continue to nominate women senators. He said that the party already had two women senators, and that PAS had "never prevented" its members from supporting women candidates in championing the cause of Islam. This was seen he added, when PAS members supported two women candidates from the now defunct Parti Melayu Semangat 46 which defended the parliamentary constituency of Kota Bharu and the state assembly seat of Mekebang in the 1990 elections.³²¹

I may make a quick observation here to say that making an exception for some women, women senators and state assembly nominees for that matter, seems eclectic and politically

319 Reported in *The Star* daily of Kuala Lumpur, March 18, 1999, p. 14.

320 Quoted in *The Star* article "PAS Ruling to 'Protect Women'," March 25, 1999, p. 2.

321 *Id.*

expedient. These are apparently influential women and that alone seems to be the reason for relaxing the prohibitive ruling in their favour.

Nik Aziz's statements were not well received and invoked negative responses from the government leaders and media commentators. Prime Minister, Dr. Mahathir, said that women had their roles and responsibilities "but we cannot separate them and tell them to stay at home. Who are the people selling vegetables at the Kota Bharu market? Are they all Nik Aziz's?" He said this in his speech at a meeting with Barisan Nasional component party members in Alor Setar on 21st March 1990.³²²

The Human Resources Minister, Lim Ah Lek, praised the contribution of the women workforce and said that "it was wrong to even think about the idea. Instead of equal opportunities, it is discrimination and regress for the women as well as affecting the livelihood of the family." He added that it would be an offence under the law to disallow women to work, especially when they want to work, and it is their right to do so. Lim said this "after attending the weekly cabinet meeting on Wednesday March 17."³²³

The Prime Minister's wife, Dr. Siti Hasmah Ali said "it would be a waste if women were not allowed to work. Women make up 50% of the population and there are women who are professional."³²⁴

The Malaysian Trade Union Congress Deputy President, Mohamed Shafie Mamat said that working wives had contributed to the family income, and the nation's progress could be stunted if women were not allowed to work.³²⁵

322 Reported in *The Star* of Kuala Lumpur, March 22, 1999, p. 2.

323 "PAS Proposal Draws Scorn," *The Star*, Kuala Lumpur, March 18, 1999, p. 14.

324 Id.

325 Id.

In a subsequent interview within the same week Chief Minister Nik Aziz said that his statement about the mother's role at home and in the workplace had been politicised. He said he made his earlier statement to emphasise the upbringing of children so that "they would not be associated with drug abuse, indulge in promiscuous sex and rape." He also said he was not questioning the right of widowed women or orphans to seek employment, but was aiming instead at the well-to-do mothers who "work for the sake of money and enjoyment."³²⁶

Utusan Malaysia (daily) carried a commentary saying that "Malaysian women were shocked by the statement." It said the achievement of several leading women in business and government did not come overnight but after "fighting male prejudice." It went on to say that PAS was unrealistic when it "presented its narrow opinion" to the people of Malaysia.³²⁷

Mingguan Malaysia also criticised Nik Aziz and asked if PAS leaders can support single mothers who are jobless. Statistics show that Kelantan recorded a 13% divorce rate in 1997. Nik Aziz should study the causes, the paper added, and consider the realities that working women were facing.³²⁸

In a letter to the Editor, Parmodini Menon, Vice Chairman of the Malaysian Trade Union Congress's Women's Committee commented that the theory Nik Aziz has advocated is two-sided. Earning money is as important as taking care of the children, teaching them and instilling in them religious values. Malaysia does not have a minimum wage law and there are employers who pay as little as RM300 per month. If the plan was to be introduced on a realistic note, this should at least be increased to RM1,200. If the person is

326 "Debate over Nik Aziz's view on working women," *The Star*, Kuala Lumpur, March 27, 1999, p. 20.

327 *Id.*

328 *Id.*

married, then his minimum wages must be higher, and still higher if there are children. Is the government prepared to do this? If the man himself is unemployed, is the government prepared to provide enough for the entire family? In any case, the right to work is a basic right of women. If this right is taken away, it devalues them. Then again, sooner or later her other choices and rights will be threatened, such as the right to education, the right to make decisions concerning herself and her family, and the right to political participation.

In 1997, the Malaysian Government proposed to amend the Employment Act to encourage women to come out and work as the country was facing a labour shortage and did not want to be overly dependent on foreign workers. "What has Nik Aziz to say to this?"

Menon added: We are burdened with the reality that many men are not responsible for their women and children. Many women are being divorced every year without getting their due share of maintenance and matrimonial property. Many more children are abandoned by fathers who deliberately ignore court orders to provide child maintenance. The real solution is not denying women the right to work; it is to provide women with the support system needed to exercise their rights. This includes affordable child care centres in the neighbourhood or workplace, flexible working hours and extended (no-pay) maternity leave for nursing mothers.³²⁹

Representatives of the seven women's organisations of Malaysia also wrote in a commentary that "Nik Aziz Mat's retrogressive comments on women, work and the family are causing much concern to us in the women's movement." This is in view specially of the fact that "there is nothing in the

329 Pramodini Menon, "Women Have the Right to Choose," *The Star*, March 25, 1999, p. 22.

Qur'ān or in the hadith which prevents women from working outside the home. In fact the Qur'ān extols the leadership of Bilqis, the Queen of Sheba for her capacity to fulfil the requirements of the office, for her political skills, her leadership qualities and her independent judgment." (27:23-44). If a woman is qualified and the one best suited to a task, there is no Qur'ānic injunction that prohibits her from any undertaking because of her sex. The hadith literature also records many instances of women leaders, scholars and women who fully participated in public life.

The women groups representatives added that for most Malaysian families both parents have to work in order to provide a decent standard of living for the family. Malaysians live in a society that encourages women to work and excel academically. Malaysian girls are outperforming boys in almost all areas of education, reflecting similar worldwide trends. A reference was also made to Malaysian statistics for 1998 which recorded the following:

- Girls form 65.3 per cent of the enrollment for pre-university education.
- Girls form 54.5 per cent of the 79,014 students enrolled in public sector institutions of higher learning.
- 58.7 per cent of the students in pure and applied sciences and in medicine and allied health are female.
- 61.2 per cent of the students in law, economics, management and accountancy are female.
- In 1990 the female labour force participation was 45.8 per cent and this rose to 47.1 per cent in 1995.

These figures challenge the widespread beliefs of the patriarchal society that men are inherently superior to women. Women are high achievers and have much to contribute to the development of the *ummah*.

The women's groups added that in their experience of working with women at the grass roots they were "daily confronted with the stark reality that many men are not responsible for their women and children, and also that Muslims record the highest divorce rate in Malaysia. The 1997 statistics from the Selangor Syariah Court also revealed that out of 2,165 cases of divorce registered with the court, there were only 29 cases of *mut'ah*, 58 cases of division of matrimonial property, 55 cases of wife maintenance, 63 cases of child maintenance, and only ten cases of *'iddah* maintenance. This "abysmal record from one of the most developed states in Malaysia is a tragic reflection of how far reality is from the Qur'ānic ideal of responsible Muslim male." It was further added that the experience of single mothers shows that their standard of living plunges immediately or they fall into the poverty trap upon divorce or desertion, while their ex-husbands tend to experience little change in their living standards.³³⁰

II. The Shari'ah Perspective

This discussion begins with brief introductory remarks on the merits of work in Islam and then proceeds to examine the status of women through the reading of the Qur'ān and Sunna and the juristic doctrines of the leading ulema.

The word *'amal* (lit. work, action, and conduct) is often used in the Qur'ān, the Sunna and *fiqh* literature in conjunction with *'aqidah* and *'imān* (dogma, faith and belief).

330 "Denying Women Right to Work Deprives Them of Choice," *New Straits Times*, Kuala Lumpur, March 20, 1999. The seven women groups whose names appear at the end of this article are: Sisters in Islam, All Women's Action Society, Pusat Khidmat Wanita Pertiwi, Women's Aid Organisation, Women's Crisis Centre, and Women's Development Collective.

This juxtaposition of *'aḳīdah* and *'amal* conveys with it the message that the two go hand in hand and that the one is basically deficient without the other. *'Amal* in this sense has religious and spiritual undertones and it is often viewed in the Qur'ān and Sunna as the external manifestation of a state of mind.

The spiritual content of *'amal* can thus be seen in the following Qur'ānic address to the Prophet Muhammad:

Tell the believers: you must work. Then soon will God observe your work and so will His Messenger and the believers (al-Tawbah, 9:105).

وَقُلْ أَعْمَلُوا فَسَيَرَى اللَّهُ عَمَلَكُمْ وَرَسُولُهُ وَالْمُؤْمِنُونَ

The Prophet is thus directed to remind the people of the value of work and what it takes to make it a source of pride for the community and a firm basis by which to gain the pleasure of God and His Messenger. It is then declared in another Qur'ānic *ayah* that "We shall not cause to waste the recompense of one who excels in *'amal*." (al-Kahf, 18:30).

إِنَّا لَا نُضِيعُ أَجْرَ مَنْ أَحْسَنَ عَمَلًا

The reference to *'amal* in both of these *āyāt* is to all works both pertaining to the affairs of this world and those of the next. This is because in Islam lawful *'amal* becomes a dimension of worship (*'ibādah*) when it is done to the best of one's ability. Work that qualifies as service to God must necessarily be of a high calibre wherein attention is paid to quality and the anticipated outcome, and it is free of dishonesty, cheating and negligence. The Prophet has added his voice to this when he said in a hadith that "God loves it

when a worker undertakes a work that he does it well."³³¹ The Prophet has in another hadith declared that "No one has ever eaten food purer than what is earned by the toil of one's hands. For the Prophet (cum-King) David, peace be on him, used to earn his living by the toil of his hands."³³²

إن الله يحب من العامل إذا عمل أن يحسن.
ما أكل أحد طعاماً قط خيراً من أن يأكل من عمل يده،
وإن نبي الله داود عليه السلام كان يأكل من عمل يده.

This and the other quotations above are evidently not gender based and apply equally to all.

The Qur'ān is affirmative on women's right to work and their exclusive right to what they earn as a result of it. There is, in principle, no distinction in this being a right of every individual without consideration of gender, race and religion. Women are thus entitled to take up all lawful occupations they might be capable of doing.³³³ The Qur'ān thus declares in absolutely general and unqualified terms that "Men are entitled to what they earn and women are entitled to what they earn." (al-Nisā, 4:32).

لِّلرِّجَالِ نَصِيبٌ مِّمَّا اكْتَسَبُوا وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا اكْتَسَبْنَ

The substance of this proclamation has also been endorsed elsewhere in the text where God Most High makes it known that "I will not suffer the work of any worker among you to be lost, whether male or female, the one of you being from the other." (āl-Imrān, 3:195).

أَنِّي لَا أُضِيعُ عَمَلَ عَمِلٍ مِنْكُمْ مِنْ ذَكَرٍ وَأُنْثَى بَعْضُكُمْ مِنْ بَعْضٍ

331 Muslim, *Mukhtasar Sahih Muslim*, p.327, hadith 1201.

332 Tabrizi, *Mishkat*, Vol. II, hadith 2759.

333 Al-'Abūdi, *Al-Hurriyyāt al-Ijtimā'īyya*, p. 84.

The late Rector of al-Azhar, Shaykh Maḥmūd Shaltūt's commentary on this *āyah* draws attention to the phrase (*ba'dukum min ba'd*) which eliminates distinction between men and women and suggests substantive equality between them. This Qur'ānic expression also signifies partnership and co-operation between men and women in family and society in the sense that both play equally important roles and there is no superiority of one over the other.³³⁴

The Qur'ān also entitles men and women equally to the exercise of *wilāyah* (protection, authority) in respect of one another and also in the sphere of public affairs and government. Thus it is declared that "the believers, men and women, are protectors (*awliyā'*, pl. of *walī*) of one another, they command good and they forbid evil." (al-Tawbah, 9:71).

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ
يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ

In addition to validating *wilāyah* for men and women in the sense of cooperation and mutual support, this *āyah* also entitles them both to the most comprehensive of all *wilāyāt*, which is to promote good and to prevent evil, also known as *ḥisba*. *Ḥisba* is a broad Qur'ānic doctrine, so much so that government itself is a branch of *ḥisba*, which means that participation in government and leadership in political affairs is a right equally of men and women. Women are consequently entitled to hold government positions that may involve the exercise of authority and *wilāyah* in all spheres of government.³³⁵

Work from the Sharī'ah perspective may be evaluated as either recommendable (*mandūb*) or obligatory (*wājib*), just as it may, in the negative sense, be classified as reprehensible

334 Shaltut, *Al-Islam 'Aqīda wa Sharī'ah*, p. 195.

335 Al-Shawāribi, *al-Ḥuqūq al-Siyāsiyya li'l-Mar'ah fi'l-Islam*, p. 85 ff.

(*makruh*) or forbidden (*ḥarām*). Work is recommendable if it is beneficial and prevents the individual from dependency on others, poverty and begging. Work that is obligatory may consist either of a personal obligation (*fard 'ayn*), or a collective obligation (*fard kifā'i*). To exert oneself in order to earn a lawful living in the face of dependency and degradation is a personal obligation of every capable individual, especially if one's bodily needs and protection against destruction and disease cannot be met in any other way. Work is also obligatory in order to repay a personal debt, if the debt in question cannot be otherwise repaid.³³⁶ This is also the position of the able-bodied man, who is under a Qur'ānic duty to support his immediate family, wife, and children (cf. al-Ṭalāq: 65:6, al-Baqarah, 2:133).

Work which partakes in *fard kifā'i* refers to all beneficial work that promotes public welfare such as working in industry and agriculture, health services, education and the like. If some people in the community undertake it, the duty is fulfilled generally, but works of this kind may never be abandoned altogether. In the event when this happens, the government may compel to work those who are capable of doing it.³³⁷

Work that is contrary to the norms of Islam and partakes in prejudice and corruption is unlawful, and so is the revenue that is earned through it. Work that involves gambling, prostitution, sorcery, wine drinking and trading therein, either directly or indirectly, or work which contributes toward these - all amounts to *ma'ṣiyah* and sin that must be avoided. The basic rule here is that what leads to *ḥarām* and is used as a means toward procuring it also becomes *ḥarām*.³³⁸ Should

336 Al-Shaybani, *Al-Kitāb fi'l-Rizq al-Mustatāb*, p. 32; Badawi, *Da'a'im*, p. 381; al-Shishāni, *al-Ḥurriyyāt al-'Āmma*, p. 307.

337 Cf. Abu Zahrah, *Tanzīm al-Islām li'l-Mujtama'*, p. 51.

338 Cf. Ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'in*, Vol. III, p. 147.

there arise a conflict between the fulfilment on the one hand of a personal obligation (*farḍ 'ayn*) and indulgence in unlawful work on the other, the latter is tolerated, according to some ulema, including Imam Mālik, to the extent necessary, but no more. The subject would then be covered by the rules of necessity or *darūrah*.³³⁹ To quote but one legal maxim on the subject of *darūrah*, it is thus declared that "necessity makes the unlawful lawful."

Muḥammad al-Ghazālī and Sādiq Afīfī³⁴⁰ have both concurred with Abū Zahrah to the effect that the Sharī'a entitles women to work and to earn their living whenever they need to do so or when they can make a special contribution to society. But they add that it is preferable for women to devote their creative energy and work to motherhood since they can make a unique contribution in this area to the well-being of the family and society. It is then added that women may join the workforce in the following four situations:

- (1) when they have abilities and skills that are particularly valuable to the community as a whole. This is when they excel others, including men, and the role they can play here is considered almost as unique as they can play as mother and manager of the household.
- (2) when they undertake work to which they are particularly suited such as working in child care, in health care services and education. Some ulema, including Ibn al-Humām al-Ḥanafī, have considered this kind of work as a collective obligation (*farḍ kifā'i*) that applies particularly

339 Cf. al-Shātibi, *Al-I'tisām*, Vol. II, p. 300.

340 Al-Ghazālī, *Ḥuqūq al-Insān*, pp. 134-136. See also Sādiq 'Afīfī, *al-Mujtama' al-Islāmī*, pp. 209-211.

to women. As for the question of agreement between the spouses, the husband is advised not to stand in the way of his wife when she wishes to work in any of these capacities.

- (3) when women work side by side with their husbands and family and assist them in their work. This is often the case in the countryside where in farming families, small landholders and other low-income families women assist their men-folk in various capacities, often combining their duties as mothers and household managers with these other activities. Their contribution in these capacities deserves special recognition and "these are the exemplary women of our society; they are hardworking, efficient and compassionate, not like the ones who work as singers and dancers in the night clubs...."
- (4) when a women is in need of earning a living to support herself and her family and there is no one else to support her and her family, in which case she would have to work as a matter of necessity. Having said this al-Ghazali added that in an Islamic welfare state, this last category of women are entitled to support from the public treasury (*bayt al-māl*) regardless as to whether she is a Muslim or a non-Muslim. For this is the purport of the hadith in which the Prophet has declared "whoever leaves behind property, it shall belong to his heirs, but if he leaves a debt or dependents in need, they shall be my responsibility."³⁴¹

من ترك مالا فلورثته و من ترك ديناً أو
ضيقاً فإليّ و عليّ.

341 Hadith reported by all the major collections of hadith (i.e. *muttafaḥun alayh*): al-Bukhari, *Ṣaḥīḥ al-Bukhārī*, III, 155.

Commentators from early times have advanced certain views concerning women's equality in matters of employment and eligibility to public office. There are those who maintain that men and women are equal only in regard to what is known as the domain of private authority (*wilāya khāṣa*), but not in respect of what involves the exercise of public authority (*wilāyah 'amma*). *Wilāyah* is defined as the authority of one person over another person or persons which renders the latter bound by the decision of the former without any need for prior agreement.³⁴² Private *wilāyah* refers primarily to guardianship over the person and property of another because of some deficiency in the legal capacity of the latter. It is thus stated that women can be legal guardians and may be employed as teachers and nurses or supervisors of *waqf* (charitable endowment) but not as ministers, judges and political leaders.³⁴³

As for women's eligibility for public office which partakes in *wilāyah 'amma*, such as the office of the head of state, prime minister (*wazīr al-tafwīd*), judge, governor, officer in charge of market inspection and *ḥisba*, the head of public grievances tribunal (*wālī al-mazālīm*), which partake in both religious and temporal authority, commentators have held that only the first two are reserved for men but the rest are subject to disagreement. Abul Ḥasan al-Māwardī (d. 450H) thus precluded women from the top two posts as both involved military leadership for which women were not eligible. The main textual authority that is quoted for this view consists of the Qur'ānic *āyah* which declared that "men are the maintainers (*qawwāmūn*) of women for what God has made some of them excel others and for what they spend out of their

342 Al-Sanhūrī, *Fiqh al-Khilāfa wa Taṭawwruhā*, p. 187.

343 Cf. Mutawallī, *Mabūdī*, p. 417.

wealth" (al-Nisā', 4:35).

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ
عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ .

Another *āyah* that is quoted in this context provides that "women have rights similar to those that men have over them in a just manner, and men are a degree above them." (al-Baqarah, 2:228).

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِمْ دَرَجَةٌ

There is also the hadith which declared that "a nation whose affairs are led by a woman shall not prosper."³⁴⁴

لَنْ يَفْلَحَ الْقَوْمَ وَلَوْ أَمَرَهُمْ امْرَأَةٌ.

Both of these *āyāt* have, however, come under scrutiny by a number of commentators, including the Supreme Court of Pakistan and the view generally held is that the two *āyāt* basically explain one another and the degree that is granted to men signifies leadership in the family on account, that is, of their responsibility for the provision of maintenance. The general equality of the sexes in respect of rights and duties has in the meantime, been confirmed by the second of these two texts.

General consensus (*ijmā'*) is often cited to the effect that only men are eligible for the office of the head of state and prime minister. This ruling has then been extended by way of analogy (*qiyās*) to a number of other public offices, as mentioned above, which are also reserved for men. Imam Abū Ḥanīfah has held, on the other hand, that women may become judges in matters wherein they are admissible as witnesses,

344 Tabrizi, *Miskāt*, Vol. II, hadith 3693.

which means practically all matters except the prescribed penalties (*ḥudūd*) and just retaliation (*qiyās*).³⁴⁵ This is also a ruling of *qiyās*, but the original case here is testimony of witnesses, not the office of the head of state. Ibn Ḥazm al-Zāhiri has held, on the other hand, that except for the office of the head of state, women are eligible for all other offices of government. In support of this view, Ibn Ḥazm has cited the Qur'ānic text on the very subject of government, which provides that "God commands you to hand over the trusts (*al-amānāt*) to whom that they belong, and when you judge between people, you judge with justice." (*al-Nisā*, 4:58).

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا
وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

This text, Ibn Ḥazm stated, is perfectly general and draws no distinction between men and women. The Qur'ān basically addresses everyone, men and women, and we follow it as such.³⁴⁶

With regard to judicial office, Ibn Jarīr al-Ṭabari, the author of *Tafsīr al-Ṭabari*, has held that women may become judges in all types of disputes, including the *ḥudūd* and *qiyās*. Ṭabari criticised the analogy that is drawn between the office of the head of state and that of the judge to be superfluous. For the head of state is commander-in-chief of the army, whereas the judge is not. The most important qualification for a judicial post, according to al-Ṭabari, is knowledge of Sharī'a and the ability to conduct *ijtihād* in regard to which men and women stand exactly on the same footing.³⁴⁷

As for the hadith which has been quoted in support of the majority ruling that women are not qualified to become judge

345 Al-Māwardi, *Alḥkam*, p. 65.

346 Ibn Ḥazm, *Al-Muḥallā*, edr. Ḥasan Zaydān, Vol. X, p. 632.

347 Cf. al-Mawardi, *Alḥkam*, p. 64.

or Imam, it is evidently an inference. The hadith was, as the records indicate, concerned with a particular situation, that is, when the Prophet was informed that the daughter of the Chosroe of Persia had taken charge of the affairs of that country. It is also noted that the hadith does not contain a ruling but speaks of prosperity and success. Ibn Ḥazm has commented concerning this hadith that it refers, in any case, to only one position, namely that of the head of state and does not apply to other public offices (*wilāyāt*) to which women are generally eligible. More recently, commentators have added the observation that unlike the earlier times, power in a modern state is diffused between its various organs and is subjected to a set of constitutional checks and balances in almost all Muslim countries. Under these conditions even when a woman becomes the head of state, her powers would be limited by these factors.

The minority view, which is supported by a wide spectrum of modern scholars and ulema, including Rashīd Riḍā, Maḥmūd Shahtūt, Muḥammad Yusuf Mūsā, ‘Abd al-Ḥamīd Mutawalli and others maintains that women are qualified to be representatives (*wakīl*) in Parliament, ministers, witnesses and judges, all of which partake in the exercise of public authority (*wilāyah ‘amma*). They have considered the view that sought to confine women’s eligibility to the private *wilāyāt* as weak and less than acceptable.

It may also be noted in passing that a group of the Kharijites, namely the Shuhaybiyya, have held that women are eligible for the office of the head of state.³⁴⁸ The majority (*jumhūr*) have also held it permissible, as a matter of necessity, for a woman to become head of state if she assumes office by military force in order to prevent bloodshed. But this is only tolerated as the caliphate of necessity which may only last for as long as it has effective power at its disposal.³⁴⁹

348 Ibn Hazm, *Al-Fiqh*, Vol. IV, p. 167.

349 Al-‘Ilī, *al-Ḥurriyyāt*, p. 288.

CHAPTER TWELVE

Islamic Banking and Insurance : An Overview

This chapter is presented in two sections, the first and the main part of which addresses the development of Islamic banking and its related issues. The chapter then ends with an overview of Islamic insurance (*takāful*) in Malaysia.

I. Islamic Banking

The introduction of Islamic banking and insurance are often seen as the concrete manifestations of the Islamisation policy of the Mahathir administration in Malaysia. Bank Islam Malaysia Berhad (BIMB) was established with the purpose of encouraging Malay and Muslim participation in commercial activities that were clear of usury (*ribā*) and the giving or taking of interest. The clear mandate on this is, of course, found in the Qur'ānic declaration that "God permitted sale and prohibited *ribā* – al-Baqarah, 2:275). BIMB is currently the only Islamic bank operating in Malaysia. It has a total of 80 branches and a staff complement of 1, 600 persons. The initial demand for the establishment of BIMB was also stimulated by

developments in Egypt where the first Islamic bank was launched in Mit Ghamr earlier in 1963. This was taken a step further by the 1973 resolution of the Islamic Conference of Foreign Ministers and the setting up in the following year of the Islamic Development Bank in Jeddah. This was, in turn, followed by similar developments in Dubai, Sudan, Jordan and Bahrain where Islamic banking saw their early beginnings in the 1970 BIMB was incorporated as a public limited company under the Malaysia Companies Act 1965 and its activities were separately regulated under the Islamic Banking Act (IBA) 1983. In launching BIMB in 1983 Prime Minister Dr. Mahathir described it as "the first step in the larger concept of an Islamic economy" and "an alternative to the western banking system."³⁵⁰

The IBA 1983 was modelled on the Banking Act 1973 (amended in 1989 under the new name, the Banking and Financial Institutions Act) with modifications as were necessary to make it acceptable to the Shari'a. The IBA basically retained the normal practices of prudent banking contained in the Banking Act 1973 and has followed the precedent of vesting the Central Bank with similar powers of supervision and regulation over Islamic banks as was the case with other licensed banks. Whereas conventional banking activity is anchored in the giving and taking of interest, Islamic banking is premised on equity participation and true commercial activity that preclude interest bearing transactions such as trading in Treasury Bills, bonds and government securities. Yet it was felt important for Bank Islam to play a part in the development and commerce of Malaysia, which was why the Government Investment Act 1983 conferred on the

350 Quoted in Norhashimah Yasin, *Islamisation*, pp. 204 & 268

Minister powers to receive investment of money for a fixed period and to issue non-interest bearing investment certificates. The Act also specified that no interest may be paid on investment but there may instead be paid dividends based on benevolent loan or *qard al-hasan*.

The BIMB memorandum of Association stated that "all business of the company will be transacted in accordance with Islamic principles, rules, and practices." Section (2) of the Islamic Banking Act provides that Islamic Bank "means any company which carries on Islamic banking business and holds a valid licence." "Islamic banking business" means banking business "whose aims and objectives do not involve any element which is not approved by the religion of Islam."

The Islamic banking system in Malaysia comprises the Central Bank as the supervising authority, the BIMB, and also commercial banks, merchant banks, finance companies, and discount houses that participate in *Skim Perbankan Islam* (SPI) or The Islamic Banking Scheme. BIMB and the commercial banks are the only institutions allowed to offer Islamic current accounts. As of mid-1999, there were 24 commercial banks participating in the SPI making Islamic banking facilities available in 1,663 branches in the country. Eighteen finance companies with 820 branches in the country, five merchant banks and seven discount houses are also participants of SPI.

Section (3) of the IBA provides for a Sharī'a Advisory Council to advise the bank in the operation of its banking business to ensure conformity with the Sharī'a. The BIMB Articles of Association provided that the Sharī'a Advisory Council would be made up "of Muslim religious scholars in the country... to advise the company" on its banking operations.

Islamic banking transactions are based mainly on profit and loss sharing and equity participation. These constitute the

essence of *mudāraba* and *mushāraka* modes of transaction, which are practiced alongside the *murābaha* sale, deferred payment sale, or *bay' bithaman ājil* (BBA) and leasing (*ijārah*).

Briefly in the *murābaha* (cost plus profit sale) the bank purchases the goods on behalf of the customer and sells them to the latter at an agreed price which consists of the actual cost of the goods plus a margin of profit. The customer pays back either in lump sum or by instalments. The bank performs a service and is therefore entitled to a profit margin. In Malaysia, *murābaha* is generally used in the financing of working capital requirements, such as financing the purchase of raw material for trade, and financing of goods for import and export. *Murābaha* in Malaysia is also used for shorter term financing involving lump sum repayment whereas BBA is used for medium to long term financing, such as house purchases and construction-related projects.

Bay' bithaman ājil, or deferred sale, is similar to *murābaha*. In both cases the bank buys the goods needed by the customer and sells them to the customer with a mark-up. If the payment is not staggered into regular instalments, it is *murābaha*, but if it is made in instalments it will be *bay' bithaman ājil*. Since *murābaha* is a fiduciary sale (*bay' al-amānah*), the customer must be informed of the profit margin that is added, but this information need not be disclosed in the BBA facility, which may involve deferment of the whole of the price or a portion of it and repayment may be in lump sum or in instalments at a later date. The instalment may be also in equal or different amounts. Whereas *mudāraba* and *mushāraka* involve financial intermediation and enterprise in terms of equity participation, *murābaha* and *bay' bithaman ājil* are mainly utilised for short term trade finance that consist of buying and selling activities. *Bay' bithaman ājil* has been one of the most popular banking products in Malaysia that has

accounted for a large portion of Bank Islam's financing activities.

The *mudāraba* contract can be general or specific. The duration of specific *mudāraba* will be limited to the duration of the specific project or business it is concerned with. The general purpose *mudāraba* can be for a specified or unspecified duration. An example of the general *mudāraba* contract in Malaysia is the placement of deposit in the investment account with the Islamic bank. The depositor in this case is the investor (*rabb al-māl*) and the bank is the investment manager (*mudārib*); the contract is a general purpose one in that the bank invests the funds in various projects that are not specified in the contract. An example of the specific *mudāraba* could be for the parties to specify investment in a real estate development project. The duration of this contract could be until the conclusion of the project for which it was designed.³⁵¹

In *ijārah*, or leasing, the Islamic bank usually purchases assets that are required by the customer and then leases them to the customer for a given period. The rental charges and modes of payment and other related conditions are agreed by the parties. In *ijārah thumma al-bay'*, the bank may finance the purchase of assets according to the terms of a pre-determined agreement. The customer will purchase from the bank the assets at an agreed price with all the lease rentals previously paid constituting part of such price.

The bank may undertake to finance acceptable projects under the principle of *mushāraka*, in which case the bank agrees with initiators of the project to finance the project either wholly or partly in accordance with an agreed ratio for the distribution of profit. The bank has the right to participate in the

351 Cf. Ahmad Ibrahim, "Legal Issues in the Implementation of Islamic Banking and Finance", p.14.

management of the project but any of the parties have the option to waive that right. The profit distribution ratio need not coincide with the ratio of the capital participation, but all parties bear losses, if any, in proportion to their share in the capital of the partnership.

Mushāraka can be in the form of unlimited partnership, or *mufāwada*, in which the partners enjoy complete equality in all areas of capital, management and the right of disposition, and each partner is the agent and guarantor of the other. *Mushāraka* can alternatively be in the form of limited partnership, or *‘inān*, in which two or more parties contribute to the capital fund, either with money, other assets, or labour. The partners share profits in an agreed manner and bear losses in proportion to their share in the capital. Each partner acts as the agent, but not as guarantor, of the other. The availability of the profit and loss sharing financing tends to have a deep impact on the behaviour of the fund users as they tend to be more willing to take business risks and embark on innovative ventures of long-term benefit to the economy.

The bank can also issue a letter of credit on the basis of the cost of goods to be purchased or imported under the *mushāraka* agreement and the bank accepts it under the principle of *al-wadī‘ah* (deposit). The bank establishes the letter of credit and pays the proceeds to the negotiating bank utilising both the customer's deposit and its own share of the fund and consequently releases the documents to the customer. The customer takes possession of the goods and disposes them in accordance with the terms of the agreement. The bank and the customer share the profit from the venture as provided in the agreement.

The bank may alternatively issue a letter of credit under the principle of *murābaha*, in which case the bank pays the negotiating bank utilising its own funds. The bank then sells

the goods to the customer at a price comprising its cost and a profit margin to be settled in cash or deferred terms.

The bank may also provide the facility of a letter of guarantee to its customers under the principle of *al-kafālah*. The letter of guarantee may be provided in respect of the performance of a task, the settlement of a loan etc. The bank may require the customer to place a certain amount of deposit for this facility which the bank accepts under the principle of *al-wadī'ah*. The bank charges the customer a fee for the services it provides.³⁵²

Qardul hasan, or benevolent loan, is a recommended Islamic mode of financing which in Islamic banking is usually applied to socially beneficial projects, such as extending scholarship loans to students, or giving loan to deserving customers, or financing of development projects. The borrower is under duty to repay only the principal amount of the loan according to its terms and conditions. The bank may not demand the borrower to pay anything in excess of the principal sum, although in Sharī'ah, it is desirable that the borrower does so at his own discretion. In Malaysia, this mode of financing has been utilised in the issuance of MGICs (Malaysian Government Investment Certificates) as are explained below. In Pakistan, the banks are generally required to earmark a portion of their resources for grant of *qard al-hasanah* to help achieve the socio-economic objectives set out in the constitution of that country. The Central Bank of Pakistan is authorised to provide the rules to regulate the grant of *qard al-hasanah* and the rules so provided are to be approved by the Council of Ministers.³⁵³

352 Cf. The IBA 1983, Sections 8(2,3,4).

353 Ziauddin Ahmad, *Islamic Banking*, p.50.

A direct contribution of BIMB and its subsidiaries to social welfare needs is through the payment of *zakat* (legal alms) which is meant especially to help the poor and the needy individuals and welfare organisations. BIMB has given, for example, between one and two million ringgit annually in *zakat*. These figures represent about two and a half per cent of the net profit it had earned in the relevant years of operation.

The opening of Islamic banking windows, the so-called Skim Perbankan Tanpa Faedah (SPTF), that is, the interest-free banking scheme, in 1993 was a landmark development in the short history of Islamic banking in Malaysia. The essence of this development was to utilise the existing banking system to introduce Islamic banking to the public. In July 1993 Bank Negara Malaysia issued guidelines on the STPF under section 126 of the Banking and Financial Institutions Act 1989. The conventional participating banks were then authorised to open Islamic banking counters and offer the same products and services as have been offered by Bank Islam. A pilot scheme was thus devised under the new guidelines for the first batch of conventional banking institutions that were ready to embark on the interest-free banking scheme. It was a voluntary exercise designed to stimulate wider participation and within a short time the number of conventional banks offering Islamic banking services grew from only three in 1993 to 52 four years later. The Islamic banks and participating banks have also developed more than 20 products since 1983 which have become widely available in the system.³⁵⁴

More recent measures to promote Islamic banking in Malaysia include the Bank Negara decision to replace the

354 Ahmad Mohd. Don. "Money Market and Its Role in Islamic Banking," paper presented at the Labuan International Summit on Islamic Financial and Investment Instruments, 16-18 June 1997, pp. 6-7.

terms Skim Perbankan Tanpa Faedah (SPTF) with "Perbankan Islam" or 'Islamic banking' with effect from 1st December 1998. It was also decided in view obviously of the more diversified banking products that are now available that the organisational structure of the Islamic Banking Units should be upgraded and expanded into Islamic Banking Divisions with wider scope and responsibility delegated to the Division staff.

Following the merger between Bank Bumiputra Malaysia (BBM) and Bank of Commerce (BOC), a second Islamic bank, to be known as Bank Bumi-Muamalat Malaysia (BBMM) is planned to be set up. Under the arrangement, all conventional banking assets and liabilities of BBM will be transferred to BOC while the Islamic banking assets and liabilities of BOC and BBM Kewangan Berhad will be shifted to BBM. The second Islamic bank actually commenced operations in September 1999 and opened 60 branches in the country.

Bank Negara also introduced, on 8 December 1998, the Guidelines on Islamic Negotiable Instruments, which is the Islamic equivalent of the negotiable instruments of deposit. The guidelines spelt out two new Islamic deposit-taking products, namely negotiable Islamic Debt Certificates (NDC) and Negotiable Instruments of Deposit (NID).³⁵⁵ These are designed to enhance liquidity in the system and expand securitisation and development of a secondary market for Islamic financial instruments.

II. The Islamic Financial Markets

The Islamic financial markets in Malaysia comprise the Islamic money market and the Islamic capital market.

355 Cf. *The Star* feature article by Nor Mohamed Yakob, "The philosophy of Islamic Banking," Kuala Lumpur, March 15, 1999, p. 18.

Malaysia's Islamic money market, which is the most structured of its kind in the world, conducts trading in Islamic financial instruments. The main participants of the Islamic money market are the Islamic bank, SPI commercial banks, merchant banks, finance companies and discount houses that participate in the Islamic banking Scheme (SPI).

Delevoping an Islamic money market and negotiable instruments, which had been the focus of attention since January 1994, represented a new phase in the Islamic banking industry in Malaysia. The basic issue that is being addressed here is diversification and portfolio development as well as development of a debt market. These have to this day remained among the persistent preoccupations of the Islamic banking industry in Malaysia.

The Money market in the conventional sector is an interme-diary for short term funds, providing a ready source of funds to be borrowed by deficit units, and investment opportunities by those with temporary surplus funds. These are represented by Treasury Bills, bills of exchange, promissory notes and government securities. These instruments are created simply because the interests of the two groups (surplus and deficit units), although complementary, do not necessarily match. It is the function of the money market to reconcile the interests of the two groups. Credit risk is minimised since money market instruments are liabilities mainly of the government, the central bank and the commercial banks. The money market comprises two segments: the interbank market, where the lending and the borrowing of short-term funds takes place, and the short-term money market instruments, such as Treasury Bills, bankers acceptances (BAs) and negotiable instruments of deposit.

The Islamic money market in Malaysia has been gradually developing since 1993 when Bank Negara decided to introduce it through the *mudāraba* profit-sharing concept.

The three components of the Islamic money market at present are trading of Islamic papers, *mudāraba* interbank investment, and the Islamic cheque clearing system. The Islamic interbank mechanism refers to a mechanism whereby a surplus bank and participant in Islamic banking and the Islamic bank can invest in another interest-free bank, which has a deficit, on the basis of *mudāraba* with a profit-sharing ratio that was initially determined by Bank Negara but was liberalised in February 1994 when the banks were allowed to negotiate the profit ratios among themselves.

A separate cheque clearing system for the Islamic banking sector was devised in January 1994 by Bank Negara whereby cheques in this sector were to be segregated from the conventional cheques. This was made possible as the participating commercial banks were required to maintain a *wadī'ah* (guaranteed custody) current account with Bank Negara. The banks were also required to empower Bank Negara under the concept of *al-wakālah* to square their funding positions between the surplus bank and the deposit bank through automatic cheque clearing. Should the deficit persist it would be funded by Bank Negara on the same principles of *mudāraba*.

The Islamic capital market in Malaysia comprises a primary securities market in which new issues of Islamic Government papers and Islamic corporate securities are offered to the public; a secondary market in which existing Islamic Government papers and Islamic Corporate securities are traded; the equity market and unit trusts. Islamic Government papers refer to Government Investment Issues introduced in 1983 under the Government Investment Act to issue non-interest bearing papers to the public. Since these are liquid assets, the Islamic bank and SPI banks buy them to meet their liquidity requirements and placement of their temporary idle funds.

The following Islamic financial instruments are currently being traded in the Malaysian financial markets: Government Securities, Islamic Accepted Bills, private debt securities and Islamic Negotiable Instruments. Some of these are separately addressed as follows.

1) Government Securities

(a) The Malaysian Government Investment Certificates

This represents an attempt on the part of the Malaysian government to introduce Treasury Bills/Government Bonds on a *Sharī'a* basis. Government Bonds are certificates that show government borrowings from the public and the country's financial institutions for its budgetary needs and development expenditure for public projects.

MGICs are issued by Bank Negara Malaysia (BNM) on the basis of *qard al-ḥasan* benevolent loans. They are of various short and long term maturities. The certificates carry their face value in multiples of RM10,000 and issued at par. They are redeemable at maturity or on demand at BNM at par. As noted earlier under *qard al-ḥasan*, the borrower is only obliged to repay the original sum borrowed, hence the government has the absolute discretion whether or not to reward the holders of MGICs. It may also vary the reward for the short and long term MGICs. This prospect of reward makes the MGICs a suitable instrument of monetary policy in the Islamic financial market.³⁵⁶

(b) *Cagmas Muḍāraba* Bonds

These are debt-financing instruments issued by Cagmas, the principal mortgage organisation in Malaysia, with the yield

356 Cf. Abdul Halim Ismail, "Financial Instruments", p.6; Adek Husin, "The Islamic Financial Landscape in Malaysia," p. 4ff.

from the instruments to be shared by Cagmas and the bondholders. The debts are usually the Islamic bank's financing of house purchases by their customers based on the *bay' bithaman ājl* or deferred instalment sale basis. The procedure is as follows: BIMB may package its receivable debts on house financing of a certain category and sell it to Cagmas. Cagmas then receives the monthly repayments on the houses. Cagmas converts the debt into bonds and sell these to the buyers with a view of sharing the yield in accordance with a *mudāraba* – based formula.

(2) Equity

As noted earlier, the Islamic capital market comprises stock-broking activities in corporate securities, and Islamic Stock Index which is based on Shari'a-compliant counters. There now operates an exclusively Islamic stock-broking firm and several conventional ones that offer Islamic brokerage services. In April 1999 the KLSE introduced the Islamic equity benchmark index for those who wish to invest according to Shari'a. The KLSE Islamic Index tracks Shari'a-compliant stocks from both the Main Board and Second Board.

Public listed, or even unlisted, companies may raise capital through the issuance of shares based on *mudāraba* and *mushāraka* modes, provided they are engaged in a Shari'a accepted line of business. These companies are formed under the Companies Act 1965; their form, the terms of share issues and liability are similar to the Shari'a approved formula on limited liability company, or *'inān*. To ensure that the shares of these companies may lawfully be owned and traded by Muslims, the Syariah Advisory Council of the Securities Commission issues a list of Approved Securities, also known as the *Halal* Counters, which is updated from time to time. The

list contains names of the companies on the main and the second Boards of the KLSE which are Sharī'a acceptable and excludes those which are not. The list thus precludes companies whose major activities are *ribā*-based or involve gaming, alcoholic beverages, and non-halal products. The BIMB stock and stocks of many other SPI participants are listed on the Main Board and therefore full participants in the stock market activities.

(3) Islamic Debt Securities

Financing facilities in the forms of *al-bay' bi-thamaya ājil* (deferred sale) and *al-ijārah* (leasing) are debt-financing modes giving rise to receivable debts (*al-duyūn*). The debts that are so created can, in turn, be traded in the secondary market based on the *bay' al-dayn bi'l-dayn* formula, which is acceptable within certain limitations by the Shāfi'i school. The Islamic debt market in Malaysia can be significantly enhanced through securitisation of these asset-backed debts and the creation of suitable institutional frameworks for trading in the debt financing instruments that are generated as a result.³⁵⁷

Answering a question on the subject of *bay' al-dayn* in a Kuala Lumpur conference, Yusuf al-Qaraḍāwī commented that many of the OIC Fiqh Academy ulema had rejected this instrument because *bay' al-dayn* is not included in the context of selling goods. Nevertheless, it is different if the *dayn* concerned has an underlying asset. Such assets usually comprise items like land, property, money, debts or usufruct (*manfa'ah*). If the underlying assets are mainly in the form of debts then they should be managed in accordance with certain requirements. The same applies to the underlying assets that

357 Id., p.10.

are mainly in the form of currency which must also be managed in a certain manner. The same currency, for example, can be used for sale and purchase provided that there is equality, *taqābuḍ* (taking possession) and simultaneous exchange as in *'aqd al-ṣarf*, that is, the currency exchange contract.³⁵⁸

The BIMB has securitised some of its debts. In one of the Bank's syndicated financing for RM125 million *al-bay' bithaman ājil* facility to a multinational company that was setting up a distillation plant in Malaysia, the said company issued a series of promissory notes with amounts and maturity dates according to the repayment schedules of the financing to the syndication participants. Bank Negara Malaysia (BNM) then allowed the notes to be traded in the secondary market among designated institutions.

The issuance of Islamic bonds of over RM2 billion to finance the Kuala Lumpur International Airport (KLIA) is another example. In this case, the KLIA authority first sold for cash concession for the airport to the financial institutions that had formed a consortium for the purpose. Subsequently it bought back the concession on deferred sale or *bay' bithaman ājil* basis, which gave rise to debt. The consortium securitised the debt and offered it for trading in the secondary market.³⁵⁹ Islamic debt securities have become increasingly popular and also more diversified as it applies various models of financing such as *mushāraka*, *ijārah* and *qard al-ḥasan*. Islamic debt securities also comprise medium term Islamic bonds and short term Islamic commercial papers.

358 Al-Qaradāwī, *Islam and Current Issues*, p.20.

359 Id., p.10.

III. Issues in Islamic Banking

The five issues that are discussed below are the crisis of identity issue, excessive reliance on short-term financing, issues relating to the legal framework, relationship with the Central Bank, and segregation of funds between Islamic and conventional banking.

1. The Identity Crisis

Islamic banking in Malaysia and elsewhere has suffered, at the initial stages, and may be to some extent even now, a certain crisis of identity as to whether they were a variation merely of conventional banks that adopted and followed their methods so much so that the epithet "Islamic" was sometimes no more than a name. The question naturally arose whether there was sufficient variation of substance and form that could distinguish Islamic banks from their conventional counter-parts. Some people criticised the Islamic banks of charging interest like other banks but with a different name, such as administration fees, service charges and so forth.

Establishing its own identity was a major challenge over the first decade of Islamic banking. But that issue appears to have been largely resolved and Islamic banking in Malaysia has become a credible reality as it is no longer, in my opinion, faced with that fundamental issue. Having said this, problems do exist nevertheless, in certain areas at least, of Islamic banking operations. Excessive reliance has, for example, been noted on short-term trade finance, namely *murābaḥa*, *bay' bithaman ājil* and *ijārah* modes of financing, which do not involve participation in economic and development-related activities. Worse still that these three modes of transaction consist of disbursement of funds with a predetermined return, which differ in reality very little from interest bearing modes of finance. I now turn to some of these issues in further detail.

2. Short-term Trade Financing

The BIMB experience during the 1980s showed that the bulk of the bank transactions took place in the forms of *bay' bithaman ājil* and *murābaha* financing modes. The former claimed a share of about 50 per cent of the bulk of transactions in 1984 which rose to about 79 per cent in 1987 and then declined slightly to 73.7 per cent in 1991. This is followed by *murābaha* which declined from an early high of 37 per cent to about 15 per cent and 13 per cent for 1987 and 1991 respectively. This concentration on mark up and deferred sale techniques remained consistent over the years. In 1992, 97.5 per cent of BIMB financing activity was based on BBA and *murābaha*, while *muḍāraba* and *mushāraka* accounted for 0.22 per cent. Leasing or *ijārah* transactions accounted for 9.3 per cent of the bank financing in 1984 but the figure went down to about 3 per cent in 1988 and rose again to 13 per cent in 1991. In 1995 and 1996, financing based on BBA and *murābaha* was 95.8 per cent and 96.2 per cent respectively. In 1997, BIMB reliance on these two methods accounted for 90.5 per cent of its total financing. This figure also applies to interest-free banking counters in the conventional banks. This heavy reliance on BBA and *murābaha* in Malaysia is also consistent with the general trend of Islamic banking practices worldwide.

There is a marked reluctance in the bank's commitment to long-term partnership financing in the *muḍāraba* and *mushāraka* modes. This is mainly related to the risk-taking element as long term financing involves higher risk. The reluctance has also been due partly to lack of expertise and qualified personnel to carry out efficient project evaluation. The BIMB figures further show that larger advances were for housing purchases, land acquisition and construction, and the smaller amounts for manufacturing and trade financing. The deferment period for payment in *bay' bithaman ājil* transactions was typically one to

three months. In *murābaha* transactions, the BIMB purchased goods on behalf of the client and resold them to the client with a markup repayable typically in three to six months.³⁶⁰

This focus on short-term trade financing is a cause for concern for two main reasons: 1) it is likely to relegate the Islamic banks to the periphery of the financial system. They will attract only a certain type of clientele, much like finance companies in hire-purchase financing or savings and loans in home mortgages. Without taking the centre stage in mainstream production activities, Islamic banks run the risk of being marginalised. 2) Short-term financing is concerned with the financing of goods already produced, and not with the creation or increase of production capital or facilities like factories and plants, infrastructure etc. Yet it is investment in such facilities that encourages real economic growth. Hence the current emphasis in Islamic banks on short-term trade financing is not congruent either with the long term objectives of the banks or with their social welfare agenda.

The issue under review is also not confined to the Malaysian experience but appears to be one of concern to Islamic banking generally. The available data indicate that "most of the Islamic banks have not been able to give sufficient attention to financing activities of a developmental nature." From the data given in the IRTI (Islamic Research and Training Institute of the Islamic Development Bank) study it appeared that most of the finance being provided by the Islamic banks went to the trade sector.³⁶¹ It is further noted that trade financing constituted up to 90 percent of total

360 Cf. Kamali, *Istihān (Juristic Preference) and Its Application to Contemporary Issues*, p. 115; BIMB Annual Report, 1998; Norhashimah Yasin, "Islamic Banking Products," *Al-Nahdah* 18(1999), 36-37.

361 Zianuddin Ahmad, *Islamic Banking*, p.34.

financing of Islamic banking worldwide. Data related to the term structure of finance in the same study showed that most Islamic banks concentrated on providing short term finance of six months or less, or medium term finance of one year or less. However, it appears that as a bank grows in age and experience, it tends to bring out a gradual shift in the pattern of its financing operation in favour of both longer term financing of developmental nature in industry and agriculture.³⁶² Comparative data shows, however, that financing through the *mudāraba* and *mushāraka* modes have actually declined over the latter half of the 1980s.³⁶³ A gradual shift toward profit and loss sharing methods of financing may be emerging in the late 1990s. But there are no definite data to prove it.

The IDB operations also appear to have conformed to the general trend of Islamic banking worldwide. Equity participation and profit and loss sharing, being the distinguishing features of Islamic banking, were enthusiastically pursued by the IDB at the initial phases of its operations. A survey of the working of the bank by one of its former principal officers points out that it "started its equity financing operations enthusiastically and gradually built up this activity to its highest level in 1401/1981. However, since then, the operations have dropped sharply in view of the bank's unhappy experience in several of its equity investments." Initially, the bank was anxious to expand the network of equity financing to cover as many of its member countries as possible, but lack of sufficient expertise to undertake adequate project appraisal and follow-up measures caused delays in implementation. Marketing difficulties as well as currency devaluations exacerbated the situation. It was subsequently reported that the bank was engaged in devising

362 Id., p.35.

363 Id., p.39.

adequate corrective measures and strategies.³⁶⁴

With reference to Malaysia, of the five financing modes of transaction (i.e. *mudāraba*, *mushāraka*, *murābaḥa*, *bay' bithaman ājil* and *ijārah*) which lay at the centre of Islamic banking business, heavy reliance was placed on the last three and a steady decline had been noticed in reliance on the first two. The BIMB statistics show, for example, that *mudāraba* financing represented 3.1 per cent of the bulk of transactions during the 1980s which actually declined further to less than one per cent in the 1990s. Corresponding figures for *mushāraka* showed a similar pattern whereby the figures recorded a high of 2.2 per cent in the 1980s which declined to 0.01 per cent in 1991.³⁶⁵

Abdul Halim Ismail, the then Managing Director of the BIMB, came out in defence of reliance on *murābaḥa* and *bay' bithaman ājil*, giving his main reasons in a seminar paper which he presented in 1985. The argument he advanced may be summarised in three points as follows:

- (a) The Sharī'a does not forbid these modes of financing. To equate *bay' bithaman ājil* and *murābaḥa* with banking interest amounts to rejecting the permissibility of modes of trade which are clearly established in Islamic law. To this it is added that BIMB has a Sharī'a Advisory Council which supervises the validity of its operations and its has not advised the Bank that these are *ḥarām* transactions.³⁶⁶

364 Zianuddin Ahmad, *Islamic Banking*, p. 41.

365 Id. p. 114.

366 Abdul Halim Ismail, "Islamic Banking in Malaysia: Some Issues, Problems and Prospects".

- (b) The requirements of the members of the public and the business sector of Malaysia are varied. There are various types of financing available to customers in relationship, for example, to house purchasing or other lines of business. To decide on a particular mode of financing is basically a matter of agreement between the financier and client and the mode they actually choose would have to meet their needs. To restrict such requirements and expect the participants and traders to give total priority to profit and loss sharing (PLS) transactions would mean failing to meet the market requirements and customer demand.
- (c) Short term methods of trade financing are on the whole less risky bearing in mind the capitalist leanings of the Malaysian economy. The possibility of getting an unscrupulous partner in PLS transaction may incur losses to BIMB as it would have to monitor the project and employ more personnel for that purpose. The longer term financing related to infrastructure facilities tend to involve commitment of larger amounts of funds and greater uncertainty over repayment. Part of this problem may be resolved by introducing appropriate incentives backed by Islamic insurance schemes to cover issues such as early withdrawal options and buyout clauses and various other support measures. The real challenge is to tailor an optimal mix of financing modes that are best suited to attracting enough investment with different time profiles and risk exposure levels.³⁶⁷

367 Cf. J.S. Dhaliwal's report on the IKIM Seminar on Islamic Response to Economic and Financial Imperatives of Globalisation, *The Star*, April 10, 1999, Business Section, p.5.

The 1995 statistics compiled by the International Association of Islamic Banks shows that 45% of the total dollar value of Islamic banking operations were based on *murābaḥa* while 15% and 9% were respectively carried out in the forms of *mushāraka* and *mudāraba* and 10% in the form of *ijārah*. Economic analysts have been critical of this over-reliance on *murābaḥa*, but it is being increasingly realised that despite the similarity of this mode of financing to interest-based financing, in some ways, *murābaḥa* does have positive features "with far reaching implications for the health of the financial system". Also it has been realized that *murābaḥa* is a trading-based mode, but there is a greater awareness still that it should be used for development purposes, such as purchase of equipment and material for development projects.³⁶⁸

3. The Legal Framework Issue

Islamic law is not the general law of Malaysia but has specific application to family and personal law matters and more recently to Islamic banking transactions. The general provisions of statutory law and those of the English common law that are in force in Malaysia still remain applicable to commercial disputes of all kind in the courts of Malaysia.

Section (5) of the Civil law Act 1956 provided that "in the absence of any written law, the law generally applicable to commercial matters and any matters incidental there to, is the English law". English law thus remains the applied law of the land in matters that are not specifically regulated by written law in Malaysia. Moreover, The IBA 1983 and other laws that regulate Islamic banking transactions are concerned mainly with the forms of transaction, licensing and regulatory matters

368 Fahim Khan "The Progrees of Islamic Banking Worldwide," pp. 8-9.

and do not, as such, extend to the sphere of substantive laws that govern dispute settlements before the courts. The issue here is that disputes arising in Islamic banking transactions are still adjudicated under the principles of English law.

Thus in *BIMB v. Tinta Press Sdn. Bhd.*,³⁶⁹ a dispute relating to a lease (*ijārah*) of printing equipment by BIMB to the defendants had to be adjudicated in the High Court under the principles of English law. In this case, the defendants argued that the transaction in question was not a lease but a loan agreement. Although the court, presided by Zakaria Yatim J, held that it was not so, no reference was made to the rules of *ijārah* or leasing under the Islamic law. The learned judge thus held:

The Bank in its affidavit denied that the Bank had granted loan facilities to the first defendant. Indeed in that affidavit the deponent stated that the Bank, operating under Islamic law does not and has not granted loans to anybody or to any corporate body, except on *qard al-hassan* basis, which is not applicable in the present case.

The Supreme Court dismissed the appeal of the appellant and held that the relationship between the parties was that of lessor and lessee as was stipulated in the agreement. The owner therefore retained ownership of the equipment while the appellant had only the possession and use of the said equipment, subject to the payment of rental. In deciding this, the court relied on the precedent of *Credit Corporation (Malaysia) Bhd. v. K.M. Basheer Ahmad and Another*.³⁷⁰ No reference was made to the Islamic law relating to *ijārah* neither

369 [1986] MLJ 256, [1987] 1 CLJ 474.

370 [1985] 1 MLJ 208

in the case under consideration, nor in the precedent on which it relied.

Moreover, some of the other transactions which constitute the main business of BIMB, such as *bay' bithaman ājil* are also covered by the provisions of the Hire Purchase Act 1969. Since the Sharī'a-based transactions do not proceed on the giving or taking of interest, this makes them very different to the modes of transaction that are provided for in this Act. New legislation is therefore needed to regulate the Sharī'a-based transactions on a separate basis.

Professor Ahmad Ibrahim's own enquiry into the divergent legal framework within which the Islamic bank must operate has led him to make the observation that "... it is not possible for a judge dealing with cases relating to the Islamic bank and its transactions merely to decide on the text of the legislation, without having an appreciation and understanding of the Islamic law relating to banking as contained in the Holy Qur'ān, the hadith and the acknowledged authorities on the Islamic law."³⁷¹

A possible solution to this could be to provide in the Islamic Banking Act that the Syariah Courts shall have the jurisdiction to deal with all matters arising under the Act. Then the Syariah Courts would have overall jurisdiction over disputes arising from Islamic banking transactions. The time may come perhaps when the Syariah Courts are converted from the state courts to federal courts, in which case there will be no difficulty in their being given jurisdiction over a federal subject. The other alternative would be to create an Islamic law division in the High Court to which should be assigned judges who are competent in the Sharī'a.³⁷²

371 Ahmad Ibrahim, "Legal Issues in the Implementation of Islamic Banking and Finance," p.36.

372 Id., p.37.

4. Relationship With the Central Bank

The fact that Islamic banking in Malaysia operates under the general supervision of Bank Negara Malaysia is a cause at once for both comfort and concern. The BNM's supervisory role over the Islamic banking system is spelled out in the IBA 1983 (sections 31-43) on matters of regulatory controls and the requirement for BIMB to maintain statutory reserves with the BNM. BNM provides the necessary framework, such as the statutory requirements; prudential guidelines, such as the Guidelines on Islamic Banking Scheme (SPI); and Guidelines on the Islamic Money Market. BNM has also established a special unit in the Bank to carry out strategic planning and formulate policies for Islamic banking. The BNM supervisory role is considered important so as to protect the interests of depositors and investors. But since BNM is not committed to the rules of Shari'a and it is not an Islamic organisation as such, its supervision over BIMB is also seen as an odd mix which limits the BIMB prospects of regulating its own operations as an independent organisation. It is pertinent to note, however, that under the IBA 1983, BNM has to ensure that the BIMB operations do not involve any element that is not approved by the Shari'a. The Minister may on the advice of BNM revoke the licence issued to BIMB if it is not pursuing its operations in accordance with the principles of Shari'a. (section 11).

In order to ensure that the BIMB operations are in agreement with the Shari'a principles, there is a provision in the IBA for the formation of a Syariah Advisory Council (Section 3(5) IBA). But the precise role of this Council and how should it carry out its task under the BNM supervision have not been very well defined. The IBA has also not specified the required qualifications of the Council members. Although the Syariah Advisory Council has the power to advise, it is

questionable as to how far it is able to perform such a function. Since the Central Bank supervises the whole banking system, the ultimate power therefore rests with the Central Bank. One can understand, of course, the government's position and interest to protect the paid up capital of the banks, but it is a cause for concern to set up an Islamic institution and then have it supervised by a non-Islamic organisation. Professor Ahmad Ibrahim who has voiced this critique has also raised the question whether the advice of the Syariah Advisory Council (SAC) can at all be challenged in the courts. The Islamic Bank is expected to comply with the SAC's advice in all its transactions in order to ensure that they are not contrary to Islamic law. There is, however, nothing in the IBA to say that once the operations of the Bank have been approved by the SAC, they shall be deemed to be Islamic and may not be reviewed in any court on that account. Even if such a challenge is allowed in a civil court, since the civil court judge is not conversant in Islamic law, he will not be competent to review and adjudicate the case. He may then decide to refer the matter to the Mufti and there is a possibility that a conflicting opinion is given by the Mufti. In the past there was the added problem with the plurality of SACs which grew in number with the spread of the interest-free banking scheme (SPTF). Several non-statutory SACs became active in various places and sometimes issued conflicting advice over the same issue. It was then felt necessary to have a single statutory SAC to advise not only the Islamic bank but also the banks running the SPTF. This has already been done and the relevant sections (124) of the Banking and Financial Institutions Act 1989 were amended to provide for a common Syariah Advisory Council. In 1997, BNM established the National Syariah Advisory Council which is authorised to issue opinion on Islamic banking and *takāful*. Although BIMB and some SPI banks

also appointed Syariah advisors to advise them on day-to-day operations, they are required to refer to BNM on policy-related Shari'a issues. It has been suggested nevertheless that the advice of the SAC is an internal matter for the Banks and it is hardly likely that the Banks will quote such advice to justify their action.³⁷³

Another issue in Islamic banking that may briefly be discussed here is the issue over the segregation of funds so as to avoid co-mingling between Islamic and conventional funds. To facilitate this, BNM has required the SPI banks to open and maintain separate current and clearing accounts with BNM. This has resulted in each SPI participating bank maintaining two account numbers, that is, a conventioned account and an Islamic account, with BNM. The SPI banks are also required to maintain separate member accounts for fund transfer and payment. This has also helped to prevent abuse in terms of wrongful accounting entries by the SPI banks with respect to Islamic banking operations. Thus the issue over the mingling of funds may be on its way to finding effective solutions.

It may be said in conclusion that one of the fundamental differences between Islamic banking and conventional banking is that the former finances only real sector activities and does not participate in speculative paper transactions which the latter often does. Bankers in the Islamic banking sector are also likely to make financing decisions by looking at the reason and need factors and tend to approve provision of funds for infrastructure facilities and commodity purchases rather than committing the bank funds to speculative business. There is consequently a growing realisation in Malaysia of the inner strength of Islamic banking, which has the potential to

373 Ahmad Ibrahim, "Legal Issues," pp. 37-38; Adek Husin, "The Islamic Financial Landscape," p.9.

contribute to the health of the banking industry as a whole. The dual banking system in Malaysia also seems to have shifted focus, with the opening of interest-free banking counters in conventional banks, from active rivalry and competition to a phase of potential cooperation and support. Islamic banking is now seen to have the capacity to contribute toward insulating the banking system against interest rate risks. When the depositor is paid in accordance to the level of profits generated by the bank, the exposure to risk which is normally associated with the mismatching of assets and liabilities is minimised in that the provider and the user of capital begin to join hands and share a common rather than a competing prospect. Yet Islamic banking is still far from being an equal party in the duo and need to develop further to realise its full potential. Part of the reason that *mudāraba* and *mushāraka* financing have not been very successful is the absence of guarantees by the Islamic banks on both the principal and return of deposits. The conventional banks attract more deposits precisely because they provide such guarantees. Be that as may, it can be said with confidence that Islamic banking in Malaysia is assured of continuing its strides into a more promising future.

II. Islamic Insurance (*Takāful*)

Banking and finance often necessitate an insurance cover. Conventional banking could rely on the existing insurance facilities in Malaysia, but not the Islamic banking, due mainly to reservations over the validity of conventional insurance from the perspective of *Shari'a*. To this effect, the Malaysian National Fatwa Council issued a verdict in 1972 that insurance, especially life insurance, was a corrupt practice as it contained elements of uncertainty (*gharar*), gambling (*maysir*) and *ribā*, and it was consequently unlawful. The policy holder who may

receive compensation is not informed how the money that the company paid to him was derived. The premium paid could have been invested in gambling or interest-related activities. Under the *takāful* system, the contract between the company and the policy holder states how the latter's instalments are to be invested and used and how any profit or surplus that is secured is to be shared between them. The Government introduced the *Takāful* (Islamic Insurance) Act in 1984, which proposed *takāful* as an alternative to conventional insurance in Malaysia. In its normal operations, the Islamic bank often assumes the roles both of a trustee and entrepreneur, and it is therefore responsible to ensure the safety of capital assets and securities of its clients against loss, damage and destruction. The Islamic bank also needs to ensure the safety and security of its own assets and interests arising from the financing and credit facilities it provides to customers. *Takāful* products have thus been designed to respond to these needs. For example, Group Family *Takāful* for covering credit facility enables the Islamic banker, or a finance company, to protect its financial interests on the financing facility granted through BBA or *al-ijārah*, to its clients, in the event of non-repayment due to untimely death or disability of the latter. *Takāful* also combines investment with its insurance function. The *mudāraba* investment activity that is often espoused with the insurance function of *takāful*, for example, entitles the clients to a certain return on their investment in *takāful* schemes.

Takāful operations in Malaysia are regulated and supervised by BNM and the BNM Governor acts as the Director General of insurance and *takāful*. There are two *takāful* operators at present, namely Syarikat Takaful Malaysia Berhad (STMB) and Takaful Nasional Sendirian Berhad operating between them a total of 113 *takāful* offices throughout the country. Total assets of the family *takāful*

funds and the general *takāful* funds amounted, as of March 1999 to RM572 million and RM205 million respectively.

STMB was set up in 1985 to conduct its activities on the basis of limited liability partnership (*sharikat al-'inān*), *takāful*, and *mudāraba*. In *'inān* partnership, the partners are allowed to value each other's skill and contribution as they like; even if one contributes a smaller share of the capital, a larger share of the profit may be reserved for him. The partners are each other's representative (*wakīl*) but not guarantor (*kafīl*) unless the latter is clearly stipulated. *Takāful* is based on the idea of mutual cooperation among a group of people who guarantee to support each other, whereas *mudāraba* operates as a commercial contract that determines profit-sharing between the provider of funds for a business venture and the business manager or entrepreneur who conducts the business. The company may accordingly act as the *mudārīb* to invest and manage the capital and take a share of profits according to a specified ratio. *Syarikat Takāful* offers a range of personal, family, group, and commercial insurance plans which provide insurance cover and also investment return to the participants. The *takāful* formula operates in line with the co-operative principles of shared responsibility and mutual help. The participants agree at the outset to pool their contributions together for the purpose of mutual support and agree that the company pays from the general *takāful* fund indemnity to participants who have suffered a defined loss, which may be the result of a calamity or accident. Any surplus that remains, after the payment of indemnity and other operational expenditures will be shared between the participants and the company.

Syarikat Takāful products currently include a general *Takāful* plan that cover personal accident, fire, motor, marine, and a personal accident cover that is specially designed for pilgrims to the *hajj* and insurance cover on workmen's

compensation, employer's liability, business interruption, ect. Group Family *Takāful* provides comprehensive cover for groups and corporations pertaining to business losses, as well as *takāful* on children's education, and a mortgage protection plan.³⁷⁴

There are usually four parties to a *takāful* plan: participant, operator, insured, and beneficiary. Anyone who has legal capacity may contribute a sum of money to the *takāful* fund to be insured against a defined risk. Those who contribute to the fund are known as participants while those of the participants who face risk and are assisted are known as insured. Those who actually benefit from the fund are known as beneficiaries, and lastly the operator is the *takaful* company that manages the fund. A participant may choose any one of the types of plans offered by the company. The family *takāful* plans have a definite period of participation according to specified terms. The *Takāful* company and the participant conclude a *takāful* contract which is based on the principle of *muḍāraba* or a modified *muḍāraba*. Three models of *muḍāraba* are currently available depending on deduction or otherwise of operational expenses prior to distribution of unutilised surplus, and whether all the surplus is to go to the participants or to be shared with the *takāful* company. The participant is normally required to pay regular *takāful* instalments in consideration for his participation in the *takāful* plan. He decides the amount of *takāful* instalments he wishes to pay subject to a minimum sum that is determined by the company. Each *takāful* instalment paid by the participant is divided and credited by the company into two separate

374 Cf. Fadhli Yusof, "The Cross-Selling of Takaful Products," a conference paper presented at the Labuan International Summit on Islamic Financial Instruments" 18 June, 1997; Azman Ismail, "Current and Future Challenges of Takaful Business," p. 4ff.

accounts, namely the Participant's Account, and the Participants Special Account (PSA). A substantial proportion such as 90% or 95% of this instalment is credited into the Participant's Account solely for the purpose of saving and investment. The balance is credited into the PSA as *tabarru'* and treated as charity to benefit fellow participants who are afflicted with injury or loss.³⁷⁵

Section 18 of *Takāful* Act 1984 requires separate accounts to be maintained for the Family, and General, *Takāful*. In General *Takāful*, the participants determine the amount for which they wish to insure under this scheme and enter into a contract of *mudāraba*. The company, acting as entrepreneur, collects the *takāful* contribution and it is also stipulated in the contract that if there is profit, it would be shared with the contributor on the basis of a specified ratio, usually of 50:50, provided the participant has not been paid any claims. This resembles closely to the no-claim bonus in motor insurance. A General *Takāful* Scheme operates on the basis of one-year participation.

Takāful in both its insurance and investment activities stays clear of *ribā* and adheres to the Sharī'a principles of transactions, especially in the *mudāraba* mode. It does not invest in interest-bearing accounts or businesses that involve interest. The contract specifications that it provides are generally made clear so as to avoid uncertainty and *gharar* as far as possible. The company also does not practice forfeiture of premiums in case of surrender or lapse of participation. *Takāful* business is also not conducted through agents and

375 Cf. Khalid Rashid, "Insurance and Muslims," a seminar paper presented in the Public lecture series of the Faculty of Law, International Islamic University, 1993; Azman Ismail, "Current and Future Challenges of Takaful," p.9.

representatives but directly by the employees of the company through "*Takāful* Desks" that are provided in Bank Islam branches and Tabung Haji offices.

These specifications help to clear *takāful* of the objections that are often levelled against insurance on grounds of uncertainty and risk-taking (*gharar*) and gambling-related activity (*maysir*). With regard to the former, it may be said that *takāful* involves *gharar* in that the parties do not know their respective rights and liabilities until the actual occurrence of the insured event. But since *takāful* partakes in the essence of cooperation in pursuit of good work, it falls within the ambit of the Qur'ānic principle of *ta'āwun* (al-Mā'idah, 5:2). The prospects of competing interests are effectively changed into a basic harmony of interests where *gharar* tends to lose much of its meaning. Another aspect of *takāful* that makes it valid under the Sharī'a is that *takāful* responds to a genuine need and even if it involves an element of *gharar*, it falls under the principle of *ḍarūrah* or necessity. According to a well-known legal maxim, which is adopted in Article (21) of the *Mejelle*, the Ottoman Civil Code, "necessity makes the unlawful permissible." Another maxim of *fiqh* that is quoted in support is that "the rules of law are liable to change with the change of time."³⁷⁶

With regard to the *maysir* content of insurance and the suggestion that equates it with wagering, it may be said that there is a difference between gambling and insurance. Gambling involves risk-taking that does not meet a genuine need and it is created by the gambler himself for the sole purpose of making profit at the expense of another person. This tends to partake in unlawful devouring of the property of others (*akl al-māl bi'l-*

376 *The Mejelle*, Eng. tr. C.R. Tyser, Art (32); see also Siddqi, *Insurance in An Islamic Economy*, pp. 40-4.

bā'il), which the Qur'ān has clearly forbidden. Insurance, even in its conventional variety, involves risk-taking which emanates in the desire to have protection against intolerable loss. Whereas the money won by the gambler is in the nature of profit, the amount received by the insured is not profit as it only provides him relief from the burden of loss that he has already suffered.³⁷⁷

And finally, the *Takāful* Act (Section 8(5) provides for the formation of a Sharī'a Supervisory Council (SAC) to ensure that the *takāful* company business transactions conform to the principles of Sharī'a. The National Syariah Advisory at BNM, as noted above, advises the company to that effect and it is for the company Director, and also BNM Governor, to take the necessary action to ensure conformity with the Sharī'a principles in the company's operational procedures.

Among the issues that have been raised over *takāful* one is concerned with the choice of a model. The question asked is whether the cooperative model that is currently followed should be replaced by a commercial model. The cooperative model is not investment-oriented and is basically driven by the idea of cooperation which may be less competitive and constrained in regard to the size of capital it can raise for business. In answer, it may be said that the basic philosophy of *takāful* (lit. mutual guarantee, or shared responsibility) is rooted in cooperation, which is clearly reflected in the definition of *takāful* business in the Takaful Act 1984 (5.2) as a scheme based on brotherhood, solidarity and mutual assistance. The cooperative model cannot therefore be isolated

377 Cf. Siddiqi, *Insurance in An Islamic Economy*, p.34; Khalid Rashid, "Insurance and Muslims," p.6.

from *takāful* operations. Having said this, there is always flexibility to include business activity based on the Sharī'a modes of transaction that could bring greater profit to the company and the participants. The Sharī'a does not preclude profitable trade from its concept of cooperation (*ta'awn*) either. Efforts should therefore be encouraged to explore the possibilities of lawful trade that would strengthen the financial viability of *takāful*.

Another issue to be briefly discussed here is related to agency. Some *takāful* operators do not use agents, which they consider to be contrary to Sharī'a, on the ground that it is improper to deduct agency expenditure from the *takāful* fund. Other *takāful* companies do on the other hand appoint agents for distribution and marketing purposes. In response it may be said that the rules of *muḍāraba* permit deduction of such expenditures that would help business promotion from the capital of *muḍāraba*. *Takāful* contracts which are modeled on *muḍāraba* may thus deduct agency expenses, not from the contribution money, perhaps, but from the profit and surplus that may be realised. Since the *takāful* operator also acts as the *muḍārib* on behalf the participant, it may be advisable to insert a clause in the agreement whereby the participant authorises the *takāful* operator to deduct agency fees even at an earlier stage if necessary. This may be further specified in terms of a percentage or such other terms that the parties may wish to insert in this agreement. To this it may be added that the Malaysian Takaful Act 1984 permits the use of agents and the issue has therefore been basically tackled. The Act does not, however, allow brokerage fees to be paid under the *takāful* scheme.

Other issues pertaining to *takāful* that have been voiced by commentators are of a practical nature. One of these being a certain shortcoming over the knowledge of Sharī'a on the

part of *takāful* operators and their employees. Some steps have been taken to remedy this and the Malaysian Insurance Institute has introduced a certificate in takaful practice programme for both insurance and *takāful* practitioners. Takaful operators have proliferated in recent years in the ASEAN region and there is now the ASEAN Takaful Group that plans to enhance cooperation among *takāful* companies in Malaysia, Brunei, Indonesia and Singapore. This is a welcome development which may hopefully lead to better training facilities, cooperation and also uniformity of practice among *takāful* operators in the region.

In conclusion it may be said that *takāful* insurance is another success story in Malaysia's efforts to make the Sharī'a law of transactions and finance a reality of the country's economic life. The success of Islamic banking, and also its problems and challenges, are to some extent reflected in Islamic insurance. Both sectors have enjoyed public support and participation almost beyond expectation, not just in Malaysia but also internationally. This is evident from the fact that there are numerous Islamic *takāful* companies that conduct successful insurance business in Geneva (since 1981), in the Bahamas, Luxembourg and Bahrain (since 1983) and the Sudan and Saudi Arabi (since 1979). The inherent strength of the *takāful* idea lies in its cooperative formula wherein the company and the client on the one hand, and then the clients among themselves commit themselves to mutual support as an act of good will (*tabarru'*). *Takāful* as such is likely to continue and maintain its already successful record, become more cost effective, and enhance its public appeal in the years to come.

Notwithstanding the encouraging record of developments that I have presented of Islamic banking and insurance in Malaysia and elsewhere, I am also apprehensive over the reluctance, even aversion, that Islamic banks have generally

shown to risk sharing with their clients. In almost every one of the five modes of transaction that constitute the bulk of Islamic banking business, the banks make stipulations that effectively transfer all risk to its clients so much so that the concept of profit-and-loss sharing that is the hallmark and philosophy of Islamic banking is totally eroded and in most cases virtually made obsolete. The *murābaha*, *mudāraba* and *mushāraka* modes of financing tend to show these tendencies more than most and the challenge thus remains for Islamic banking worldwide to show a long-term commitment to give reality and substance to the participatory and risk-sharing aspects of these modes of financing in a more credible way than they have so far been able to do.³⁷⁸

378 See for details Abdullah Saeed, *Islamic Banking and Interest*, especially chapters 4, 5, and 6.

CHAPTER THIRTEEN

Other Issues

In the two sections that follow attention is drawn initially to issues relating to the enforcement of *fatwas*. The main question to address here is whether a *fatwa* should be subjected to the normal legislative processes that are applicable to legislative bills. This is followed by a brief discussion of the issue over the beauty pageants that received considerable media attention in Malaysia.

1. Binding *Fatwas*

Section (9) of the Sharī'a Criminal Offences (Federal Territories) Act (SCOA) 1997, and many of its equivalent provisions in the various state Enactments of Malaysia, granted *fatwas* issued by the state Mufti and the Islamic Religious Council the force of law outside the normal legislative processes. A *fatwa*, after approval by the State Executive Council and the Sultan, only needs to be gazetted to become law, without any requirement for it to be tabled for debate in Parliament or the State Legislature. This is not altogether a new development as the state authorities had *fatwa*-making powers under most of the State Administration of Islamic Law

Enactments that have been in force in Malaysia in the latter half of the twentieth century. The SCOA 1997, however, went a step further to declare it an offence for "any person who gives, propagates, or disseminates any opinion contrary to any *fatwa*" in force. Anyone who does so "shall be guilty of an offence and shall on conviction be liable to a fine not exceeding 3,000 ringgit or to imprisonment for a term not exceeding two years or both" (Section 12). This provision also appears, with minimal change of words, in the Perak Administration of Islamic Law Enactment 1992 (section 21) and in many other state enactments.

Section (9) of the SCOA also makes "contempt of religious authority" a punishable offence which makes liable to fine and imprisonment of the same amount as in Section (12) anyone who "defies, disobeys, or disputes the orders or directions of the Yang di-Pertuan Agong as the Head of the Religion of Islam, the Majlis, or the Mufti, expressed or given by way of *fatwa* ..." The renewed emphasis in this Enactment on conformity to *fatwa* represents a new development in Malaysia's legal history. The new measures have been criticised as having no precedent in other Muslim countries, reflective of rigidity and intolerance and therefore tantamount to imposing a "blanket ban on freedom of speech". The new measures are also said to be unconstitutional in so far as they do not relate to any of the eight restrictions on which freedom of speech could be curtailed under Article 10(2)(a) of the federal constitution. What is more is that over the past two years or so most states in Malaysia have adopted these same provisions in their respective Sharī'a criminal offences enactments.³⁷⁹

As a juristic concept, '*fatwa*' signifies an opinion, verdict, or response, of a learned scholar of Sharī'a over an issue in

379 Cf. Sisters in Islam's Letter to the Prime Minister, 8 August 1997, p. 1.

which a response has been solicited. The jurists have often used 'fatwa' interchangeably with legal reasoning, or *ijtihād*, neither of which is, however, binding. The collection of *fatwas* that Muslim jurists and *muftis* have compiled in their capacities as jurisconsults, advisors to the judges, and learned writers are basically issue-oriented and provide feasible solutions to legal and religious issues. If one were to differentiate the *fatwa* from *ijtihād*, the former may simply consist of a response, however brief, to a question without necessarily elaborating its own justification and rationale, whereas the latter must specify its own evidential basis. A ruling of *ijtihād*, or *fatwa* for that matter, can acquire the force of law either through general consensus (*ijmā'*) or by the command of the lawful government (i.e. the *ūlu al-amr*). *Fatwa* or *ijtihād* which is not supported by either of these is not binding. A distinctive genre of legal literature, known as 'fatāwa' has developed over centuries consisting of learned responses to practical questions posed to the *mufti* often by the disputing parties in a lawsuit. If a person was dissatisfied with the *fatwa* of one *mufti*, he or she was free to consult another *mufti*, or lawyer as in the current usage, for another opinion. It may readily be said even from these cursory remarks that if the authorities in the various states of Malaysia have decided, in their capacity as the *ūlu al-amr* to give *fatwa* the automatic force of law, they may be said to have exercised their legitimate authority. A simplistic answer of this kind may seem specious, yet basically correct, from the perspective of *siyāsah shar'īyyah*, or a Sharī'a-oriented policy. I shall explore this question a little further as the discussion proceeds but it must be noted at this point that although the Sharī'a entitles the *ūlu al-amr* to determine a certain procedure for *fatwa*, that procedure must in the meantime be in harmony with the requirements of a judicious policy. As a doctrine of public law, *siyāsah shar'īyyah* is inherently rational

and consists mainly of acts and policy decisions, be they within or outside the established Sharī'a, which facilitate efficiency and good government, provided that they do not violate the recognised goals and principles of Sharī'a. The issue before us is whether giving the *fatwa* the force of law outside normal constitutional procedures, and then creating a criminal offence on that basis is judicious and acceptable within the framework of *siyāsah shar'īyyah*. If one were to envisage the federal constitution as a command of the *ūlu al-amr* *par excellence* and then reach the conclusion that the *fatwa* procedure that is now devised is at odds with the constitution, then the issue that is faced would be one of internal inconsistency and conflict within the general framework of *siyāsah shar'īyyah*. For *siyāsah shar'īyyah* advocates pursuit of the legitimate interests of the people and authorises government leaders to take all necessary measures, including legislation, that facilitate efficient management of the community affairs.³⁸⁰

This analysis points to the conclusion that a certain ruling or decision may well be within the limits of a given jurisdiction but may still be at odds with the dictates of a sound policy, or *siyāsah shar'īyyah*. With reference to *fatwa*, it may likewise be said that the government and the *ūlu al-amr* may have the authority to give it the force of law and devise a procedure to that effect, but if that procedure is at odds with the constitution, it could hardly be said to be in conformity with *siyāsah shar'īyyah*.

In a constitutional government, if the state wishes to enforce the *fatwa* of a *mufti*, it should open that *fatwa* to consultation and debate through normal procedures, before it

380 For details on *siyāsah shar'īyyah* see M.H. Kamali, "Siyāsah Shar'īyyah or the Policies of Islamic Government", *The American J. of Islamic Social Sciences*, 6 (1989), 59-81.

can become law. The authority to make law rests with Parliament at the federal level and with Legislative Assemblies at the state level. The *fatwa* of a *mufti*, or of a Council of *muftis*, for that matter, should in other words, be open to scrutiny and debate by the people's elected representatives. For otherwise, one runs the risk of marginalising the representative assemblies in favour of non-elected groups to make decisions that affect the basic rights of the people.

Furthermore, many of the state enactments in Malaysia grant to the *mufti* alone the power to "amend, modify or revoke any *fatwa* that has been issued earlier by him or by any previous *mufti*" and the modification or revocation of a *fatwa* "shall be deemed to be a *fatwa*" and may accordingly be gazetted (Section 36, Administration of Islamic Law (Federal Territories Act) 1993). This is once again seen to be narrowly focused and in disharmony with the essence of consultation. In a 13-page letter that Sisters in Islam addressed to the Prime Minister Dr. Mahathir, it was noted that too much power was delegated in the implementation and interpretation of Islamic law to a non-elected minority whose views and values are not open for debate by the silent majority of Malaysians.³⁸¹ The letter also underscored a certain trend in recent years whereby laws which are open to controversy and debate have been passed in silence. There is a need for those in religious authority to understand that they operate in a democratic multi-ethnic society where fundamental liberties are protected by the federal constitution.³⁸²

381 Sisters in Islam's Letter to the Prime Minister, dated 8 August 1997, p. 6.

382 *Id.*, p. 7.

2. The Beauty Pageants

A relatively minor issue which received a great deal of publicity in Malaysia during the second half of 1997 was the Miss Malaysia Petite 1997 pageant, held in Kuala Lumpur in June 1997, in which three Muslim girls appeared and were arrested during the beauty contest by the Religious Affairs Department of Selangor (JAIS). Noni Mohamed 19, of Penang, Fahyu Hanim Ahmad, 18, and Sharina Shari, 22, of Kedah participated in Malaysia Petite contest in a hotel in Subang Jaya. They were arrested and charged for indecent exposure under the provisions of the Selangor Syariah Criminal Enactment 1995, and also for having violated a *fatwa* that forbade them from taking part in beauty contests.³⁸³ The Enactment penalises indecent exposure with a fine of up to 1000 ringgit or six months of imprisonment or both.

The media and the public spoke openly and critically for weeks of the JAIS action and the way its officials arrested the three girls for something which "countless other Malay/Muslim girls had done ... in almost all states for as long as anyone can remember"³⁸⁴ Critical remarks were also made over the lack of publicity and relative obscurity of the *fatwa* gazetted on May 1, 1995 by the Selangor religious authorities that forbade participation of Muslim women in beauty contests making them liable to a fine of up to RM3,000 or two years of imprisonment. The officers were said to have embarked on enforcing what was an "almost unknown law and *fatwa*". Instead of informing the three contestants about the laws they would be breaking, the "religious policemen" joined the audience of the beauty contest "waiting for the young

383 *The Sun*, Kuala Lumpur, 25 July 1997, p. 27.

384 *Id.*

women to appear on stage and then they pounced".³⁸⁵ The religious authority clearly wasn't wishing for the law or modesty to be observed. "It wanted to arrest ... and then convict. There is neither anything moral nor Islamic in that".³⁸⁶ The explanation that they could not stop the girls from participating "because the complaint was made only hours before the show must have been the most absurd ever to come from people said to be so learned. They had the time to buy the tickets for show"³⁸⁷

Within two weeks of arrest, the three young women were charged, found guilty and each fined RM400 for indecent dressing under Section 31 of the Selangor Sharī'a Criminal Enactment and for violating a *fatwa* under Section 12(c) – a display of efficiency that the Syariah Courts are hardly known for.

Anwar Ibrahim, the then Deputy Prime Minister, commented concerning this incident that "no one should be over-zealous in implementing the law ... we must use our wisdom and not simply pronounce the laws against anybody. We can inform the society by using a moderate and wise method which will not create fear or worry among the people". Anwar Ibrahim added that in principle "we do not encourage Muslims to participate in beauty contests, but any action taken must be done carefully and wisely."³⁸⁸

The Prime Minister Dr. Mahathir Mohamad also warned those given "what little powers" to enforce religious matters not to abuse them, as this gave Islam a bad name. He also said

385 *The Sun*, Kuala Lumpur, July 11, 1997, p. 11. Report and comment by A. Ghani Ismail.

386 *Id.*

387 Aziz Hassan, "Syariah Laws: Forcing or Enforcing?" *The Sun*, Kuala Lumpur, 25 July 1997, p. 20.

388 *The Sun*, Kuala Lumpur, 6 July 1997, p. 5.

that arrests and handcuffing religious offenders were not the way to promote Islam. Dr. Mahathir added that there is lack of uniformity in the administration of Islamic laws in the states which is caused by the fact that the administration of Islamic law is controlled by the states. "I will try to talk to the Rulers on this matter so that we can establish uniformity in our Islamic administration."³⁸⁹

A commentator noted that "Islamic law should be implemented justly or not implemented at all ..." The religious authorities should apprehend every Muslim and avoid scapegoating odd individuals, for "otherwise it will be terribly unfair to the three girls." Will these measures be applied to athletes who appear in their sportswear, and to women at the beach and public swimming pools?³⁹⁰

Commentators also noted that "any state laws and *fatwa* that affect the people's fundamental liberties must be consistent with the provisions of the federal and state constitutions. The *fatwa* is only issued by the religious authorities actually exercising powers that belong to Parliament. Moreover the offence of indecency under the state Syariah Criminal Offences Enactments may be said to be "an unconstitutional trespass on federal powers." The public outcry over the beauty pageant issue shows that Malaysians are no longer willing to remain silent in the face of "injustice, extremism and overzealousness committed in the name of religion."³⁹¹

The Minister responsible for religious affairs at the Prime Minister's Department, Dr. Abdul Hamid Othman announced that he would call for a meeting of all heads of state religious departments to streamline guidelines and mode of

389 *The Star*, Kuala Lumpur, 23 July 1997, p. 8.

390 *The Star*, 22, July 1997, Section 2, p. 17.

391 Sisters in Islam, "Modesty According to the Qur'an," *New Straits Times*, Kuala Lumpur, August 9, 1997, p. 11.

enforcement on indecent dress and behavior among Muslims. He added that the meeting will determine what constitutes indecent dressing and behavior before the law is generally enforced.³⁹² Dr. Hamid Othman had, however, initially supported the action by JAIS. Although he did not repeat his stand, "he never retracted it."³⁹³ The guidelines are still expected and, as of this writing, it is not known whether Dr. Abdul Hamid Othman has persuaded the state religious authorities to agree to a uniform set of guidelines.

392 Id.

393 Abdul Aziz Bari, "Beauty Contests and the Syariah Laws," *The Sun*, Kuala Lumpur, 27 July 1997, p. 12.

CHAPTER FOURTEEN

Issue Over the *Kharaj Tax*

This chapter is presented in three sections, the first of which is a statement of the issue over the proposed *kharaj* tax in Terengganu, which is then followed by a Sharī'a-based analysis of *kharaj*, and then a response as to the suitability of the revival of *kharaj* under the present conditions in Terengganu.

I. Statement of the Issue

Malaysia's tenth general election took place on 29 November 1999 when this book was in the process of publication. The result of this election became known the following day and the *Barisan Nasional* government under the leadership of Dr. Mahathir Mohamad was returned to power with an impressive majority of two-thirds (of 148 out of 193 seats) in parliament. Pre-election publicity had predicted the *Barisan Nasional* victory but doubts were expressed as to whether it would win a two third majority in parliament. The *Barisan Alternatif*, that is the coalition of PAS, Keadilan, DAP

(Democratic Action Party) and PRM (Parti Rakyat Malaysia) failed to realise their expectations. All of them scored poor results, and the DAP leader Lim Kit Siang lost his parliamentary seat and his party won only ten (of previously 20) seats in parliament. A former DAP leader, Wee Choo Keong said that "Lim Kit Siang must be blamed for the party's defeat in the election because he was warned of the consequences of a pact with PAS ... the pact was one of the reasons which led to the DAP internal crisis last year."³⁹⁴ Keadilan won five seats in parliament and its president, Dr. Wan Azizah Ismail won the Permatang Pauh parliamentary seat in Penang. PAS was the only coalition member which won 27 seats in parliament, a much larger number than expected and scored a clear lead over the *Barisan Nasional* in Terengganu. The fact that PAS wrenched Terengganu from UMNO was indicative of a decisive shift in the voting patterns of the northern states as PAS has also increased its presence in Kedah and Perlis, although these last two were retained by the UMNO-led *Barisan Nasional*. It was expected that it might be the newly-formed Keadilan under the leadership of Dr. Wan Azizah Ismail, rather than PAS, that might lead the opposition. The result showed the opposite. Keadilan Deputy President, Dr. Chandra Muzaffar did not win the Bandar Tun Razak district of Kuala Lumpur, for which he was a candidate. PAS won Terengganu and Abdul Hadi Awang, the Deputy President of PAS, became its new Chief Minister.

Within days of his appointment, Abdul Hadi Awang announced a ban on gambling, sale of alcoholic drinks and entertainment centres in the State. He explained this by declaring that "Islamic laws are the highest of all laws. It is our

394 *The Star* December 2, 1999, p. 2 article entitled "Kit Siang to blame say former DAP leaders."

duty after being given a mandate by the people to ensure Islam is above everything else."³⁹⁵ Abdul Hadi added that these measures would be implemented "according to legitimate processes" as the PAS election manifesto had announced. This probably means that the matter would be proposed to the State Legislature for approval.

It is reported, however, that there are few gambling outlets in Terengganu and vice activities as well as consumption of alcohol had been checked due to the fact that "for the past 20 years the Terengganu *Barisan Nasional* had embarked on its own Islamisation programme."

Again within the first week of taking office, Abdul Hadi made front-page news by announcing his plan to impose *kharaj* tax on non-Muslims in the State at the rate of five to ten per cent. "The tax will be levied on all kinds of business activity, agricultural undertaking, mining and other industries" and it will be implemented when it is approved by the State Assembly. Chairman of the Terengganu Syariah Implementation Committee, Harun Taib, explained that "Muslims would also be required to pay the *zakat* (tithe) to the State government at a rate of between 5% to 10% of their net annual income from economic activities, besides *zakat* and *fitrah* which is already implemented."³⁹⁶ These proposals were further explained by PAS to the effect that the Muslims paid three types of *zakat* at different rates respectively on agriculture, businesses and livestock, whereas "*kharaj* for non-Muslims is only output yielded from land." While saying this, Ahmad Awang, President of the Confederation of Selangor

395 Quoted in *The Star* front page article by Mustafa Kamal Basri and Wan Hamidi Hamid, "Hadi Slaps Ban," December 2, 1999.

396 Front page article "Up To 10% Tax" by Mustafa Kamal Basri and Farid Jamaluddin, *The Star*, Kuala Lumpur, December 6, 1999.

and Federal Territory Islamic Dakwah Association added that "there is actually no tyranny in imposing this (*kharaj*). The *zakat* imposed on non-Muslims is actually more than the *kharaj* on non-Muslims."³⁹⁷

Public reaction to the plan over *kharaj* tax was hesitant in the first few days but grew more critical soon after. The Finance Minister, Daim Zainuddin's immediate reaction was fairly mild when he said that the PAS-led Terengganu Government's proposed imposition of *kharaj* (tax on non-Muslims) seems not in line with the Government's policy of low tax regime. He added that there were already a number of taxes in the country and the Government was moving to reduce them. To a question as to how would the federal Government respond to Terengganu's request to lower the corporate tax so that Terengganu Government could collect the *kharaj* without burdening the people – the Finance Minister said "If they do come to us, as it is a question of law and the constitution, we would refer it to Attorney General's Chambers."³⁹⁸ Other commentators also voiced criticism that the new tax proposal was discriminatory against non-Muslims and also disagreeable to the Constitution. The UMNO Youth leader and subsequently Minister of Youth and Sports, Hishamuddin Hussein, warned PAS to ensure that any proposal such as *kharaj* (land tax) for non-Muslims in Terengganu "will not affect racial and religious harmony ... We in UMNO uphold Islam and we believe in propagating Islam but we are doing it with the support of non-Muslims in the country."³⁹⁹

397 *The Sun*, Kuala Lumpur, December 8, 1999, p. 3.

398 *The Star*, December 7, 1999, p. 4 report entitled "PAS tax plan out of line, says Daim."

399 *The Star* front-page report, "Youth Warns PAS not to jeopardise harmony," December 8, 1999.

Former Minister of Islamic Affairs in the Prime Minister's Department, Dr. Abdul Hamid Othman who is now back in his old ministerial portfolio said "the Terengganu government must be cautious in its proposed imposition of *kharaj* on the business activities of non-Muslims ... besides posing a burden to non-Muslims, its imposition may also scare off investors" most of whom operate in the petroleum and gas industries which had created job opportunities for the locals.⁴⁰⁰ Two other commentators quoted in the same report described the *kharaj* as unconstitutional, and noted that tax laws come under the purview of the federal constitution and implementing the *kharaj* will be unconstitutional.⁴⁰¹

An anonymous non-Muslim from Kuala Lumpur wrote in a letter to the editor entitled "Imbalance not an issue in religious dues" wrote that every religion imposes a certain kind of charity on its followers. "Christians are encouraged to give tithes while Buddhists and Hindus give alms to temples." The quantum of the payment is a reflection of the individual's faith, and thus a matter of religious awareness on his part. Terengganu's plan to impose the *kharaj* tax and the explanation that Muslims have to pay the *zakat* and therefore non-Muslims have to pay its equivalent in the name of *kharaj* and thus "to say that there is an imbalance would not be true."⁴⁰² DAP party Chairman, Lim Kit Siang, said that the *kharaj* tax proposal has raised "many questions, including those related to Muslim supremacy and ownership over land." He said that non-Muslims in Terengganu and the rest of Malaysia should be consulted first before the proposal is implemented. DAP Vice-President, Lim Guan Eng, "urged

400 Id.

401 Id. These were R. Supiah, and M. Kayveas.

402 *The Star*, December 8, 1999, p. 21.

the *Barisan Nasional* to use its two-thirds mandate to prevent PAS governments in Kelantan and Terengganu from implementing Islamic policies that affect the rights of non-Muslims.⁴⁰³

There is still some uncertainty over the PAS policy on the issue, and it is not clear whether Hadi Awang's proposal represents PAS official policy or his own initiative. Subky Latif, a PAS Central Committee member said that the "implementation of *kharaj* must be streamlined with federal laws and the people's acceptance must also be considered ... There needs to be a lot more study in order for us to implement the system."⁴⁰⁴ The hesitation that is expressed here tends to be confirmed by the fact that Kelantan has not announced any plan over the *kharaj* and it seems that Terengganu's initiative is not taken up by the Kelantan administration. The only announcement that Kelantan made as of this writing was by the Deputy Chief Minister of Kelantan, Abdul Halim Abdul Rahman, who was quoted to have said very briefly that "the state might consider" implementing the *kharaj* in line with that of the Terengganu state government.⁴⁰⁵

In a subsequent announcement, Abdul Hadi Awang said that the proposed *kharaj* for land in Terengganu would not be double taxation and that it merely replaced the existing land tax adding that "Islam forbids double taxation." He reiterated that *kharaj* would be imposed on non-Muslims as *zakat* was to Muslims, and that the PAS government in Terengganu had

403 *The Sun*, December 8, 1999, p. 3, report entitled "DAP to discuss Kharaj issue with PAS."

404 *The Sun* front-page article, "PAS May Drop Tax Proposal," December 8, 1999.

405 *The Star*, Kuala Lumpur, December 18, 1999, p. 2 report entitled "Kharaj Will Scare Investors."

planned to abolish all kinds of land taxes and replace them with *zakat* and *kharaj*.⁴⁰⁶ In response to this the president of The Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism, A. Vaithilingham said that introducing different forms of taxation in the name of religion was "unfair, discriminatory and unacceptable." He also said that any attempt to amend the federal constitution to "implement the Syariah laws, the hudud laws or collection of taxes from non-Muslims only will be strongly opposed by the MCCBCHS." Vaithilingham added that this was the unanimous decision of the Council's executive committee that had met the previous day.⁴⁰⁷

The MCA Vice-President, Chan Kong Choy, also responded to Abdul Hadi Awang's statement by saying that the issue was not whether *kharaj* would be a form of double taxation. "The issue here is whether it is right for PAS to impose such a ruling on non-Muslim."⁴⁰⁸

II. A Juridical Analysis of *Kharaj*

The revenues of the Islamic state in earlier times consisted of a number of taxes and charities salient among which were the *zakah* (legal alms), poll-tax (*jizyah*), land tax (*kharaj*), *fay'* (assets surrendered by conquered people without resistance or

406 Hadi Awang added that there are two types of *kharaj* – *muqasamah* and *wazifah*. The former is tax on agriculture produce while the latter is tax on land type. *Kharaj muqasamah* is done according to the number of crops cultivated in a year and *kharaj wazifah* is only taken once a year. His statement was carried by *The Star*, Kuala Lumpur, December 15, 1999, p. 12, report entitled "Hadi: Kharaj not a double taxation scheme."

407 *The Star*, December 16, 1999, p. 6 report entitled "non-Muslim body objects to *kharaj* proposal."

408 *The Star*, December 16, 1999, p. 6 report entitled "non-Muslim body objects to *kharaj* proposal."

use of force), *ghanimah* (spoils of war taken through military conquest) and the *'ushūr* (tithes) on agricultural produce.

Kharaj literally means revenue that is derived from the produce of land or its rental. The word conveys the sense of levy and Muslim jurists have used it for land tax imposed by the Muslim ruler on fertile land owned by non-Muslims in the conquered territories who surrendered to the Muslim authorities without the use of force.⁴⁰⁹ It is sometimes referred to as *jizyat al-ard*, or levy on the land, in contradistinction to *jizyah* or poll tax that is levied on persons.

Non-Muslim subjects are subject to the payment of *jizyah* by the clear text of the Qur'ān (al-Tawbah, 9:29), but the difference between *jizyah* and *kharaj* in the sense of the one being levied on the person and the other on land is not determined by the text but by *ijtihād*. Similarly the Qur'ān and Sunna do not provide specific authority for *kharaj*, and its imposition on land conquered by Muslims is based on *ijtihād* of the second Caliph 'Umar b. al-Khaṭṭāb. The words *kharaj* and *kharj* occur in the Qur'ān in the sense, not of land tax, but of bounty and reward: "*am tas'aluhum kharjan? fa kharāju rabbika khayr*" (or do you ask them for any tribute? But the bounty of thy Lord is better. (Mu'minūn, 23:72) The word has occurred many times in the hadith and it signifies a variety of meanings, in addition, that is, to the Qur'ānic sense of reward or bounty. The two words *jizya* (poll tax) and *kharaj* often occur inter-changeably in the hadith, but later the jurists reserved *kharaj* only for land tax.⁴¹⁰ Juridically, *kharaj* is described as a *ḥukm taklīfī*, that is, a binding rule of Islamic law addressed to anyone, whether Muslim or non-Muslim,

409 Cf. Zuhaili, *al-Fiqh al-Islāmī Wa Adillatuh*, Vol. V, p. 532.

410 Cf. Hasanuz Zaman, *Economic Functions of an Islamic State*, pp. 197-198; Ḥasan Ibrahim Ḥasan, *al-Nuẓum al-Islamiyya*, p. 229.

man or woman, even child or insane who controls fertile *kharaji* land to pay a certain amount of tax to the Muslim state. The quantity, time and terms of its payment are discretionary matters that are determined by the Islamic government.⁴¹¹

Islamic law recognises two types of land tax, one of which is the tithes or '*ushūr*' that is levied on land owned by Muslims, and the other *kharaj* which is imposed on land owned by non-Muslims. Since *kharaj* is land tax that is levied by virtue of a peaceful surrender, it is, as such, included in the broad meaning of *fay*'. *Fay*' refers to all property, including land, its revenue, animals etc., that are received from the enemy without actual fighting. *Fay*' differs from *ghanīma*, or spoils of war proper, which is obtained from the defeated enemy as a result of fighting.⁴¹²

The criteria of distinction between *kharaji* land and '*ushūri*' land are not devoid of some complexity as the following discussion will show. Broadly speaking, *kharaj* is not taken from categories of land which are known as *al-arḍ al-'ushriyya*, that is, land which is subject to the payment of tithes or '*ushūr*'. Al-Māwardi has specified the '*ushūr*' lands as follows:

- (a) Land whose owner became Muslim without the occurrence of a war. The owner thus remains in control of his property and pays the tithe (*ḍarībat al-'ushr*) which is another name for *zakah* on land produce. *Kharaj* may not be imposed on this type of land.
- (b) Land which is taken by Muslims through military conquest and war, but which the ruler has subsequently

411 Wizārat al-Awqāf, *al-Mawsu'a al-Fiqhiyya*, Kuwait, Vol. 19, p. 56.

412 Cf. Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 294; Siddiqi, *The Role of State in the Economy: An Islamic Perspective*, p. 73.

distributed among the Muslim warriors. The land becomes their property after distribution and it is consequently liable to *'ushūr*, not *kharaj*.

- (c) When a Muslim reclaims barren land, the former status of the land remains unchanged: If it were *kharaj* land previously, it would remain as such and if it were *'ushūr* land, it would continue as *'ushūr*.

Kharaj land, on the other hand, is land whose non-Muslim owners reach an agreement with the Muslim state to retain control of their property in consideration of payment of *kharaj*.⁴¹³ Muslim jurists have differentiated *'ushr* and *kharaj* from one another on the analysis that *'ushr* falls due on the produce whereas *kharaj* constitutes a charge on the *dhimma* of a person and its cause is ownership of fertile land. *'Ushr* is not taken unless there is produce but *kharaj* is taken even if land is not cultivated. It is said further that *'ushr*, which is a part of *zakah*, partakes in devotion (*'ibādah*) whereas *kharaj* is said to partake in punishment (*'uqūbah*).⁴¹⁴ Many jurists have disputed this characterisation, and rightly so, as there may be circumstances where Muslims also pay *kharaj*. For example, when the *kharaj* land that belongs to a non-Muslim is sold to a Muslim, the Hanafis have held that the new owner, even though a Muslim, will continue paying the *kharaj* as *kharaj* and *'ushr* may not be levied on one and the same property. The majority have held on the other hand that the two may combine and the Muslim owner would be liable to the payment of both the *'ushr* and *kharaj*.⁴¹⁵ When the Caliph

413 Al-Māwardī, *al-Ahkām al-Sultāniyyah*, p. 131; Ibrāhīm Hasan, *al-Nuzum al-Islamiyya*, pp. 221-222; Zuhailī, *al-Fiqh al-Islāmī*, Vol. II, p. 821.

414 Cf. Zuhailī, *al-Fiqh al-Islāmī*, Vol. II, p. 824.

415 Id., p. 825.

'Umar conquered the Sawad land of 'Iraq he left the agricultural land in the possession of their owners. He levied *jizyah* on the person of the landowner, if he did not convert to Islam, and levied *kharaj* on the land, even when the owner became Muslim, as these were lands which had been conquered by force. The Caliph is said to have followed the same method in Syria and Egypt.⁴¹⁶ This meant that *kharaj* was also levied on Muslims under those circumstances, but anyone who embraced Islam no longer had to pay the *jizyah*. The Hanafi school also permits the non-Muslim citizen (i.e. *dhimmi*) to buy *'ushūr* land from Muslims in which case it turns into *kharajī* land although the majority maintain that it is preferable that *dhimmis* do not own *'ushūr* land but if they do they must pay double the amount of *'ushr* in tax.⁴¹⁷ It thus appears that the criteria of distinction between the *kharajī* and *'ushūrī* land is a subject of disagreement among the *madhāhib* and ambiguity has persisted in some areas ever since. Irregular practices by Umayyad and Abbasid rulers have been recorded in regard to both *jizyah* and *kharaj*. Converts were sometimes required to continue paying the *jizyah*, and *kharaj* was sometime imposed as a lump sum payment and a tribute to the Muslim state, rather than land tax as such.⁴¹⁸

During the Prophet's time tax was paid by both Muslims and non-Muslims of Arabia: Muslims paid the *zakah* and non-Muslims paid the *jizyah*. The later conquests of territories outside Arabia raised for the first time the problem of taxing the land occupied exclusively by the non-Muslim subjects who were not necessarily prospective Muslims. The newly conquered territories of Iraq and Syria were also more fertile

416 Id., p. 821.

417 Wizārat al-Awqāf, *al-Mawṣu'a al-fiqhiyya*, Vol. 19, p. 62 ff.

418 See for details Hasanuz Zaman, *Economic Functions of the Islamic State*, p. 262 ff.

and their higher yield justified a tax regime higher than that of the *zakah*. This led the second Caliph 'Umar to organise the administration of land tax differently from that of *zakah*. The basic principles of equity and fairness were used as indicators of determining the quantities of land tax. There was disagreement among the leading Companions, many of whom were of the view that the conquered lands of Iraq were included in the spoils of war (*ghanā'im*) and were therefore to be distributed according to the Qur'ānic decree (al-Anfāl, 8:41) among the Muslim warriors. The Caliph 'Umar took a different view and thought that distribution of the Sawad land was likely to turn the Muslim warriors into sedentary landlords who might neglect their duty in respect to *jihād*. The Caliph also thought that these assets belonged to the whole of the Muslim community and not merely to a certain group thereof, and that the future generations of Muslims should also benefit by them. The Caliph debated the issue with his fellow Companions and in support of his *ijtihād* he quoted the Qur'ānic passage in Sura al-Hashr (59:6-10) which clearly entitled the poor, the orphan and the wayfarer to the revenues of *fay'*. The Caliph also cited in the same passage the Qur'ānic guideline that warned against the concentration of wealth only among the rich, and he reached the conclusion to leave the Sawad lands of Iraq in the possession of their owners but to impose a *kharaj* tax on them. The new tax was payable to the public treasury and could thus be utilised for the benefit of the whole community. The Caliph eventually managed to persuade others and it is said that his ruling was supported by general consensus of the participants in the debate. It was a *maslahah* based *ijtihād* which contemplated the wider interest of the community as well as the concern that land must remain productive and it was therefore deemed necessary to leave it in the hands of the local inhabitants. It was thought that

distributing those properties among the warriors who were neither resident nor familiar with local conditions raised the fear of neglect and deterioration of the land.⁴¹⁹

As for determining the quantities of *kharaj* over the fertile lands of Iraq, the Caliph 'Umar solicited local opinion and asked local persons competent to report about the pre-Islamic levy, and then he fixed the rate of tax in the light of their evidence. He always impressed upon his tax collectors to be kind and just in their assessment and collection of land tax. Abu Yusuf thus wrote that when Egypt was conquered, the Caliph 'Umar devised his taxation policy after he received direct personal advice from a local Copt and ensured that it was fair.⁴²⁰ When a community was taxed on this principle, no more was to be exacted even if they could bear it, but if they were unable to pay, the levy was made easier so that they were not burdened beyond their ability. This policy was adopted everywhere and the *kharaj* tax during the time of the Pious Caliphs is generally considered to have been fair.⁴²¹

From the viewpoint of its quantitative determination *kharaj* is divided into two types, namely *kharaj al-waḥīfah* (fixed quantity *kharaj*) and *kharaj al-muqāsama*, or percentage-based *kharaj*. *Kharaj al-waḥīfah* consisted of a fixed amount of money or produce on acreage of land that was not changeable, whereas *kharaj al-muqāsama* was changeable as it consisted of a percentage of the actual produce. The first variety was practiced by the Caliph 'Umar b. al-Khaṭṭāb when he imposed *kharaj* on the fertile lands of Iraq and Egypt following their conquest at the rate of fourteen dirham per

419 Wizārat al-Awqāf, *al-Mawsu'a al-Fiqhiyya*, Vol. 19, pp. 56-57.

420 Abu Yusuf, *Kitāb al-Kharaj*, p. 21; Hasanuz Zaman, *Economic Functions*, p. 203.

421 Ibrahim Hasan, *al-Nuẓum al-Islamiyya*, p. 225.

faddān of cultivated land, which came to about 3.55 dirham on an acre (*jarib*).⁴²² The second type, that is, *kharaj al-muqasama*, which consists of a portion or percentage of the produce may be based on a sharecropping formula and the quantity and time of collection may consequently be affected by harvesting patterns and other factors that relate to type and productivity of the land.⁴²³

Although juristic opinion associates *kharaj* with peaceful surrender and agreement of its owners, it seems that the precedent of the Caliph 'Umar was not confined to this scenario alone. Iraq and Egypt were conquered and what followed involved levying of two types of *kharaj*, namely *kharaj* through settlement (*al-kharāj al-ṣulḥī*) and *kharāj* by force (*al-kharāj al-'anwī*). The former is the typical *kharaj* whereby the landowners were left in control of their properties and they agreed to pay the *kharaj* tax to the Muslim state. Alternatively the settlement that was reached transferred the ownership of land to the Muslims, which was to be cultivated by its owners in lieu of payment of *kharaj* to the Muslim state. In *kharaj 'anwī*, the owners of land in conquered territories often fled and abandoned their land due to fear but without resistance and the state turned the property into a *waqf* in perpetuity for the benefit of the Muslim community and administered the land itself.⁴²⁴

Historians have noted that *kharaj* tax was not very well-known during the time of the Pious Caliphs and conceptual uncertainty existed over the *kharaj* as many actually regarded it to be a part of the *jizyah* poll-tax that is levied on non-Muslims

422 One *faddān* is equivalent of three and a half acres.

423 Cf. Zuhāily, *al-Fiqh al-Islāmī*, Vol. II, p. 823; Ibrahim Hasan, *al-Nuzum al-Islamiyya*, p. 223.

424 Wizārat al-Awqāf, *al-Mawsu'ca al-Fiqhiyya*, Vol. 19, pp. 58-61.

and it was only in later years that *kharaj* was identified as a tax on land. Nor did *kharaj* imply a fixed amount of levy in the early days as it tended to vary and was liable to change according to the condition of the land.⁴²⁵

As for the basic rationale of *kharaj* some controversy has arisen over the question as to whether the Prophet had ever levied any tax on non-Muslims over and above the per-head levy of *jizyah*. Some scholars suggest that the concept of *kharaj* as distinct from *jizyah* originated during the time of 'Umar b. Abd al-Aziz toward the end of the first century hijrah or even later whereas others have confirmed that it was introduced during the time of 'Umar b. al-Khaṭṭāb. There is some evidence to justify that *kharaj* was actually "'Umar's innovation"⁴²⁶ and that a double tax on non-Muslims did not enjoy the explicit or implied approval of the Prophet, although juristic reasoning seems to have validated it, as I shall presently explain.

The *jizyah* that was levied on non-Muslims was the counterpart of *zakah* that was payable by Muslims. *Zakah* was payable by every Muslim who owned assets to the extent of the required quorum and that included even the child and also the elderly as well as women. *Jizyah* was, however, only payable by able bodied adults and not by women. Children, the elderly and even the monks were exempted from the payment of *jizyah*. The quantities of *zakah* ranged between two and a half to ten per cent depending on the type of assets, while the rate of *jizyah* was determined by the Prophet at one dinar per person. Now if it is believed that the Prophet applied only these two levies, one for Muslims and the other for non-Muslims, it will imply that he treated non-Muslims more

425 Cf. Ibrāhīm Hasan, *al-Nuẓūm al-Islāmiyya*, pp. 223-224.

426 Cf. Hasanuz Zaman, *Economic Functions of the Islamic State*, p. 198.

favourably than Muslims. Apart from the quantitative differential of *zakah* and *jizyah*, about two-third of non-Muslims consisting of children, women, the elderly and the priests were exempted from *jizyah*. In an agricultural or nomadic society, or any society for that matter, where Muslims and non-Muslims have a similar level of affluence, the Muslims would pay many times more tax than their fellow non-Muslims. This situation is made worse by the fact that the *zakah* payer cannot be the direct beneficiary of *zakah* whereas the non-Muslim destitutes have been included among the beneficiaries of *zakah* funds without actually contributing anything to it. Furthermore, the amount of *jizyah* can be reduced, as it has been at different times of history, but the *zakah* percentages were fixed by the Prophet and could not be revised downwards. It has consequently been argued that this substantial disparity between *jizyah* and *zakah* has been remedied by the imposition of *kharaj* on non-Muslims. There needed to be some additional measures taken to moderate the differential as otherwise the non-Muslims would be bound to have an edge over the Muslims.⁴²⁷ The jurists were consequently persuaded to turn the *kharaj*, which was basically a fiscal matter of state policy, into a juristic ruling and *hukm* of Islamic law that demanded compliance.

It is of interest to note that Muslims were not the first to introduce land tax. The Romans and Persians had practiced land tax and had established methods of assessment and collection in various localities under their rule which the Muslims then found convenient and allowed them to continue. Thus it is noted that Arab conquerors usually left the indigenous authorities the task of tax administration according to their own traditions. For the Arabs, these taxes were an

427 Cf. Hasanuz Zaman, *Economic Functions*, pp. 198-199.

acknowledgment of Islamic domination; for the populace, it was simply a case of the old taxes going to new masters. This background history is partly held responsible for the fact that the Islamic fiscal system varied from region to region in such a way that "it would never be able entirely to absorb the conceptualisation of the *fikh* or the centralising efforts of the 'Abbāsīd administration."⁴²⁸ Problems of coordination in the administration of *kharaj* that persisted were due in part also to the perception of the tax and its methods of collection. Factors relating to irrigation, land fertility, local methods of measurement of the units of land surface, and a variety of other factors played a role in the disparities that many have recorded concerning the *kharaj*.

Taxfarming which came into use under the 'Abbāsīds in the outlying areas of the empire was frequently resorted to by the government in power. Collection of revenue, which might have been for a single tax such as *kharaj*, or for all the taxes of a district or province, was accordingly made the responsibility of a local landowner or tribal chief, who then collected the taxes from the local peasants and paid them to the government. The methods that were applied became known variously as *muqāṭa'a* and *ḍamān*. The taxfarmer often contracted to pay annually to the state a sum of money for a stipulated period, which sum he recovered on his own account from the taxpayers. The taxfarmer thus acted as a middleman whose only interest in the land was its revenue. "The system was open to great abuse. Its spread was usually symptomatic of a breakdown in the administration of the finances of the state."⁴²⁹ The taxfarmers all over the empire committed

428 Claude Cohen, "Kharadj," *The Encyclopedia of Islam*, New Edition, Vol. IV, p. 1030.

429 Id., p. 1046.

abuses. Later the Ottomans brought certain changes but periodical improvement and decline are also reported in subsequent periods.

III. What of the *Kharaj* Now?

The foregoing account provides an inkling of the origins of *kharaj*, its juridical features and problems of implementation. Now if one poses the question of reviving the *kharaj* tax, such as the new Chief Minister of Terengganu has posed, questions are bound to arise as to the model or precedent that one might consider for purposes both of legitimacy and implementation. There are difficulties in this, and even if one goes back to the period of the second Caliph 'Umar b. al-Khaṭṭāb, which would seem to be the most likely frame of reference for the Terengganu administration, then one hurdle that comes to mind and would be difficult to resolve is this: The Caliph 'Umar conquered new territories and *kharaj* was introduced as part of the military settlement that followed the conquest. This is not applicable to the current situation neither in Terengganu nor anywhere else in Malaysia. There has been no military conquest of territory and any analogy that may be drawn to the early model would be at least partially deficient.

Supposing one leaves that aspect of early history behind and addresses the issue from the purely *maṣlahah*-based perspective of trying to introduce a balanced and equitable tax regime — the purpose would obviously be to even out any imbalances that might exist in the present system of taxation. But then the question is likely to arise whether acting on *maṣlahah* needs to be tied to the *kharaj* at all. For Terengganu, it seems that claiming an Islamic precedent here is seen as a basis of legitimacy and proof of Islamic authenticity. But that

sentiment, compelling as it may seem under the prevailing circumstances and the aftermath of the tenth election, does not necessarily turn *kharaj* any more Islamic than it has ever been. Islamic law might have validated *kharaj*, or that *kharaj* was basically a policy matter and an historical development that in either case need not be seen as a criterion of Islamic legitimacy. *Maṣlaḥah* and *ijtihād* on the other hand are decidedly Islamic and command greater credibility as well as greater relevance to the issue of equity and balance in taxation. Before I elaborate on the subject of *maṣlaḥah*, however, it may briefly be mentioned that *kharaj* was basically a land tax on non-Muslims imposed side by side with the '*ushūr*' that was imposed on Muslim landowners. The other limb of this scenario was *jizyah* that was also applied to non-Muslims. Now if the Terengganu administration proposes to revive an historical model, then the model should surely be studied and applied together with its other relevant parts. This is not likely to be feasible as the state of Terengganu, being a part of the federation of Malaysia, will find it difficult to apply the various parts of the historical model without changing certain clauses of the federal constitution that have a bearing on taxation and federal-state relations.

Now to go back to the point I raised earlier over a *maṣlaḥah*-based proposition to introduce an additional tax, whether in the name of *kharaj* or any other name, then *maṣlaḥah* as a proof and doctrine of Sharī'a has at least three prerequisites which must be present before a new law or ruling is issued under its name. Firstly that *maṣlaḥah* must be genuine (*ḥaqīqīyya*) as opposed to what may be said to be a plausible and spacious *maṣlaḥah*. To ascertain this aspect of *maṣlaḥah*, there needs to be persuasive evidence to show that the proposed ruling is in some way related to the recognised benefits (*maṣāliḥ mu'tabara*) of Sharī'a and promote the valid

goals and objectives of Sharī'a.⁴³⁰ The second prerequisite of *maṣlahah* is that any legislation proposed in its name must be general (*kullīya*) which brings greatest benefit to the largest number of people and that it is not for the benefit only of a section or class of the community. And lastly that the proposed *maṣlahah* is not in conflict with the clear text (*naṣṣ*) of the Qur'ān and Sunna.

I do not propose to enter further details on the application of these conditions to the present situation in Terengganu, but merely raise the question: is there a case at all? Do we need to introduce a new tax, or consider such a move to be for the *maṣlahah* of the people? Is there an issue to address that might resemble the one that the Caliph 'Umar b. al-Khaṭṭāb faced? Is the present tax regime that is applied in Malaysia problematic and inequitable?

Following the Terengganu announcement over the proposed introduction of *kharaj* tax, I was interviewed by a newspaper correspondent and I was asked the question whether introducing *kharaj* in Terengganu was a good idea. I responded by saying that national unity and amicable relations between the different strata of the community was a matter of priority in Malaysia, which needs to be protected and carefully safeguarded against potential challenge. I added then that one can accept diversity in the area of private law such as matrimonial law, inheritance and customary matters among the Muslims and non-Muslims, but uniformity should be the goal in the area of public law such as constitutional law, criminal law, labour law and taxation. Everyone regardless of his or her race and religion should be subjected to the same law in these areas, which is in fact the case under the Malaysian

430 See for detail on *maṣlahah* Kamali, *Principles of Islamic Jurisprudence*, pp. 267-283.

constitution and government policy has attached a high priority to maintaining amicable ethnic relations in the community. To levy a separate tax on non-Muslims is likely to be met with resistance by the Chinese and Indian communities who are equal contributors to the public treasury under the tax system of Malaysia. This level of uniformity is desirable and need to be safeguarded. Now if there is a case, such as the proponents of *kharaj* in Terengganu have voiced that Muslims pay *zakat* whereas non-Muslims do not pay anything equivalent thereof; if imbalance is proven to exist, maybe then the *zakat* law can also be extended to the non-Muslims. *Zakat* is basically a charity which is free of the derogatory overtones of *jizyah* and *kharaj*. The basic idea of charity would seem to be acceptable across the religious and ethnic divides of Malaysia. People can agree and unite on the idea of charity for the community benefit. Muslims will then be paying the *zakah* as a religious duty and tax and non-Muslims simply as a tax and contribution to community welfare. There is no objection to the payment of charity by non-Muslims who have always contributed in one way or another to the public treasury (*bayt al-mal*). Joining hands in good works and charity between Muslims and non-Muslims is acceptable to Islam and no unnecessary restrictions are required on this, notwithstanding the somewhat different pattern of the Islamic history on taxation.⁴³¹ I made this suggestion on a somewhat theoretical note and as a possible alternative to the *kharaj* proposition. If the issue is pursued through careful investigation and a reasonable case is made that non-Muslims in Terengganu should contribute more, then the suggestions I have put forward may merit consideration. The issue is, however, too fresh at present to draw any further conclusions over it.

431 Cf. my interview in *The Sun* daily of Kuala Lumpur, December 7, 1999 at p. 3 carried under the heading "Don: Law Should Apply to All."

CHAPTER FIFTEEN

Future Prospects and Conclusion

This chapter highlights some of the main points of the various chapters of this book, advances future projections over some, and puts forward additional reform proposals over others. It is also reflective to some extent of my personal experience of life and work in Malaysia over the past fourteen years or so.

The socio-political realities of Malaysia and its demographic composition dictate the presence of Islam as a living force in society, and some support also for the Sharī'a, yet in the meantime they generate pressures that tend to restrict the scope and intensity of a pro-Sharī'a policy and programme. Islam is an integral part of the Malay culture and gives the Muslims of Malaysia a distinctive sense of identity and role in family and society. Islam is in the meantime a Sharī'a-centred religion and a total isolation of Sharī'a from the rest of Islam is neither feasible nor meaningful. The non-Muslims of Malaysia have also seen it necessary and expedient to protect their own cultural identities and heritage, educational and political organisations. There is, in other words, no sign of the fading

away of such identities and their eventual merger into a unified culture. Islamic reassertion in recent decades appears to have stimulated a similar tendency in other religious communities. Islam is likely to remain a dominant force in Malay society, next to its Christian, Hindu and Buddhist counterparts, which are also likely to remain forceful. It seems unlikely that the Muslims of Malaysia could be persuaded to accept a diluted version of Islam in the form merely of a cultural influence. The Sharī'a is, of course, the applied law of Malaysia in the area of Muslim personal law and that is not likely to change. The changes that were thought necessary in this area have already been implemented as part of the Sharī'a law reform movement that gathered momentum in the latter part of the twentieth century. The Sharī'a laws of polygamy, child marriage and divorce have been reformed through statutory legislation that are now in force in most of the Muslim countries of the Middle East and Asia. In Malaysi, too, the Islamic Family Law (Federal Territory) Act 1984 implemented similar reform measures. These reforms are generally based on novel interpretations of the relevant passages of the Qur'ān and Sunna and this is indicative of the desire to retain the Sharī'a but to reform it within its own parameters. Malaysia's experience of reformist legislation on Islamic themes has been relatively smooth compared to the other Muslim countries of the Middle East and Asia. This is also a tendency and a pattern that is likely to continue. Malaysia's internal disparity in the administration of Islamic law represents a more difficult scenario which has little in common with the Muslim countries of other regions. Malaysia's problems relating to diversity of jurisdiction and exceptionalism at the state level are somewhat unique and would require originality and initiative to find acceptable solutions for them.

There is also a difference of orientation to Sharī'a law

reform, ranging from what might be said to be radical to moderate and conservative. Most of the countries of the Middle East and Asia have introduced measures that make polygamy and divorce subject to a judicial order, which is issued only if certain conditions are fulfilled. Child marriage has generally been outlawed and divorce has now become a judicial matter almost everywhere, including Malaysia. Judicial control over polygamy appears to be more effective than it is over divorce, but recent legislation seems to have had a weakening effect in both areas. Notwithstanding the fact that in Malaysia the Islamic Family Law (Federal Territories) Act 1994 actually overruled some of the reform measures that were taken on polygamy and divorce under a parallel legislation in 1984, it is generally true to say perhaps that Malaysia has on the whole taken a moderate approach to reformist legislation in the Sharī'a-dominated areas. Polygamy and divorce have been subjected to judicial proceedings but the legal regime is such that still leaves the husband in a relatively stronger position in both areas. Tunisia among the Muslim countries has gone as far as to declare polygamy prohibited, and Turkey has, of course, abandoned the Sharī'a altogether. Notwithstanding, the refined calibre of the Malaysian legislation and the relatively bold and effective approach that it has taken over sensitive issues, there is room for improvement in the applied aspects of the Sharī'a especially at the Syariah Court proceedings level. Syariah Courts in Malaysia are under-staffed and their proceedings are protracted and time-consuming. Similarly, the ulema of Malaysia, the *Kadhis* and *Muftis*, have taken a relatively low profile over issues compared to their peers and counterparts in countries such as Egypt and Pakistan. This is partly due to the somewhat over-regulated situation that exists concerning the *fatwa* in Malaysia. Due to a variety of reasons, including the

multi-religious composition of Malaysian society, the ulema of Malaysia, who are government employees for the most part, also operate within more regulated frameworks and are not as outspoken as their counterparts in some other Muslim countries.

Malaysia has taken a different approach to the Sharī'a in that the Malaysian constitution has formally confined the Sharī'a to the sphere of personal law. This is somewhat untypical of the constitutions of other Muslim countries in which one usually finds some kind of acknowledgement of the Sharī'a as a source of legislation, but the scope of its application is not formally confined to any particular area of the law. The Malaysian constitution has, in other words, been explicit in articulating the limits within which the Sharī'a may operate. Yet the reality of the situation may not be very different in other countries where the Sharī'a is likewise confined to matters of personal law. The relatively rapid growth of Islamic banking and insurance during the last two decades or so has evidently expanded the scope of the application of Sharī'a to the sphere of public law. Further developments along similar lines may require a suitable amendment in the constitution to open the prospects for wider application of the Sharī'a.

The era of Islamic revivalism has generated fresh demands for Islamisation of law and society in Malaysia, which have however, remained generally low-key and less than effective. Islamisation is not an officially defined or even recognised policy or programme in Malaysia although some might say it is. What we have seen are some of the features of Islamisation that are manifested in greater attention to Islam in the media, the *hajj* pilgrimage, mosque affairs and Qur'ān reading competitions. We have also seen a certain revival of the Sharī'a law of transactions, insurance and criminal law that have received greater attention over the last fifteen years or so.

Sharī'a-related education and training programmes for judges and teachers have also found a new platform in recent years through the establishment of the International Islamic University, which has risen from its modest beginning in 1983 to what is now being recognised as one of the leading universities in the country. The fact that it is the only English medium university in Malaysia has added to its general appeal and the level of demand for student admission has consistently exceeded the available capacity for placement.

For the foreseeable future, interest in the Sharī'a is likely to be confined to the selected areas of this discipline. This is a function not only of the secularist orientations of the Malaysian government but also of the multi-ethnic and multi-religious make-up of the Malaysian society. The Sharī'a modes of transaction and financing that are now practiced in the Islamic banking sector are also not exclusive in that these are open to the non-Muslims of Malaysia, who are increasingly taking part in them. This is especially the case with the Islamic housing loan schemes which tend to have attracted non-Muslim participation for purely financial reasons: they tend to be more stable and do not fluctuate with the movement of interest rates as much as the conventional housing loans tend to do. Admission to the International Islamic University Malaysia is similarly open to non-Muslims.

Malaysian leaders and intellectuals have not advised a total departure from the Sharī'a in the name either of secularist government or incompatibility with the prevailing laws of Malaysia. To retain or to abandon the Sharī'a is obviously a sensitive political issue in any Muslim country and Malaysia is no exception. A more heightened level of sensitivity over this issue seems to have come about in the wake of the decades of Islamic revivalism. Notwithstanding the choices that Malaysia has made on the side of a secular polity and the fairly limited

role that the constitution has envisaged for the Sharī'a, it seems that in actual reality, Islam and its Sharī'a play a more important role in influencing public attitude and policy in Malaysia. This is clearly visible in the prevailing socio-cultural environment of the country and the undercurrent of expectations of the Malays within and outside the Government and the ruling party, the UMNO. Compared to many Muslim countries of the Middle East and Asia, the government in Malaysia has greater control over Islam and Islamic affairs, due partly to the ethnic and religious diversity of the Malaysian society where minor issues can exacerbate religious sensitivities and become problematic.

The much publicised episode over the ratification of the Hudud Bill 1993 by the state legislature of Kelantan has given a fresh momentum to the question over the status of Sharī'a in the whole of Malaysia. This Bill was introduced following the PAS election victory and the formation of an Islamic government in Kelantan. The prospect of an expanded role for the Sharī'a in the applied law of Malaysia seems to have moved a step closer to reality and further progress would depend to some extent on developments in Kelantan. Kelantan is seen as a testing ground and a show case by the rest of Malaysia, which has, in turn, become an observer and witness within its territory of an Islamic and Sharī'a-dominated state. Although the Hudud Bill is still in abeyance, the state authorities of Kelantan have not abandoned it and have made it known that they await the right time for it to be implemented. PAS has become more vocal and assertive over its objectives especially since the turn of events in late 1998 over the arrest and trial of the former Deputy Prime Minister, Anwar Ibrahim. Many of his sympathisers seems to have joined PAS which represented the only credible opposition for the Malays. The burgeoning membership of PAS in the early months of 1999 is often

equated with disaffection within UMNO. No official figures are available to verify whether increase in PAS membership has actually been due to decrease in UMNO membership. It is too early to make accurate observation as to the role and standing of the newly formed Parti Keadilan Nasional, or Adil, under the leadership of Dr. Wan Azizah Ismail, Anwar Ibrahim's wife. Time will tell whether Adil can actually offer an alternative to PAS, or whether it would actually form a coalition with it. The fact that one witnesses this level of diversity in Malaysian politics is also indicative at once of a climate of understanding in which different politics can coexist; it is a testimony in the meantime of the resilience of the government of Kelantan which has kept the voter support on its side over a number of, one might say, turbulent years in the 1990s. Leaders from Kelantan and from the Federal government found themselves engaged in rigorous debates in which they stridently confronted one another on numerous occasions but then managed to weather the storm with latitude. It now appears that Kelantan is not seen as a threat to the stability of Malaysia and a certain maturity of outlook appears to have generally prevailed. The question is no longer as to whether or not to admit a role for the Sharī'a, but of what kind and how forceful that role should be. The recent turn of events has not yet shown a visible impact as to the position of Islam and its Sharī'a in Malaysia, but as it is generally the case, political uncertainty and turbulence tends to enhance the role of the conservative forces in society. Malaysian politics may be moving in that direction, and political leaders may see it expedient to take a more assertive stance on Islam. Since the Malaysian government is dominated by the Malay community, there tends to arise a greater need to preserve Malay unity in times when this might be seen to be under threat. Under such circumstances, Malaysian leadership is likely to increase its Islamic orientation.

As events unfolded in mid-1999, a coalition of the main opposition parties, namely PAS, the Democratic Action Party (DAP), the newly formed social justice party, known as Keadilan, and Parti Rakyat Malaysia (PRM) has emerged with the purpose evidently to challenge the government in the forthcoming elections. The election date is not known yet, as I write in September '99, but it seems that there are unresolved policy differences among the component parties of the new coalition, one of which is over the PAS demand for the establishment of an Islamic state in Malaysia. PAS leaders have said that "they will not compromise in upholding the party's Islamic state ideology while DAP leaders have told PAS to abandon its objective to set up an Islamic State."³⁹⁴ The Deputy President of KeAdilan, Dr. Chandra Muzaffar, stated that "the nature of the electoral pact of opposition political parties...would not enable the party with an Islamic state ideology to implement it. It is a simple analysis. PAS needs 96 seats or more to win the election with a majority (out of a total of 192 Parliamentary seats). Assuming that the coalition contests 96 seats, these will be divided between its four component parties. PAS will therefore be unable to contest in all the 96 seats." Furthermore, the Federal Constitution would have to be amended in order to set up an Islamic State, which would need a two-third majority in Parliament. This would be very difficult to achieve. "With such a scenario" Muzaffar added "PAS can in no way establish an Islamic State."³⁹⁵

The introduction in 1988 of a constitutional amendment which recognised the independent jurisdiction of the Syariah Courts within the judiciary at the state level was indicative of a

394 "PAS unable to Form Islamic State," *The Star*, Kuala Lumpur, June 6, 1999, p.4.

395 *Id.*

step toward recognising a more visible role for the Sharī'a. An indication it certainly is, yet not strong enough to show a strategic shift of policy over the future of the Sharī'a. But when recent developments are seen in an historical context over a longer period, one can ascertain a certain change which is more supportive, and not otherwise, of Islam and Sharī'a in Malaysia. The Malaysian judiciary is entrenched in its post-colonial model and is clearly dominated by judges and a legal profession that are not involved in Sharī'a-related issues. Sharī'a law reform and the concern to make Sharī'a an integral part of the laws of Malaysia are not a part of the daily agenda of the judges and lawyers in the Malaysian judiciary. The Syariah Courts and their judges and personnel also exist on the fringes of the system and tend to see themselves as being marginalised. The role that they play in the legal system and the limited scope of their jurisdiction tend to support their marginalised existence. Since their work pattern and types of cases they deal with do not really engage them in legal reconstruction or judicial innovation and *ijtihad*, and they tend also to be suffering from a chronic shortage of resources, one can hardly expect them to move the status of the Sharī'a in any significant way, or make a national impact in the way that leading judges in the federal judiciary are able to make.

The issue of consolidation of the Malaysian judiciary is two-fold as it consists of disparities between the civil courts and Syariah Courts, and then between the Syariah jurisdictions themselves. Every state has retained its peculiarities and has hitherto ignored the repeated calls that something needs to be done about the Syariah law and Syariah Courts of Malaysia. There was some development when it was announced in May 1999 that "Selangor, Malacca and Perlis have signed an agreement with the Federal Government to streamline their

Syariah laws, including court cases."³⁹⁶ It was stated that the agreement, effective immediately, will benefit Muslims facing long-standing problems over marriage and family matters which could only be handled by the Syariah Courts in their own states. The Minister in the Prime Minister's Department, Abdul Hamid Othman, who witnessed the signing ceremony, added however that "the agreement will not intrude into the powers of the state governments and the Rulers, who administer the appointment of Syariah court judges and laws in each state."³⁹⁷ About a month later, the Chief of UMNO women's Organisation (Wanita UMNO) and Minister in the Prime Minister's Department, Dr. Siti Zaharah Sulaiman said that Wanita UMNO will try to "find a way to standardise the implementation of family laws." She added on an obviously less than optimistic note "We don't want to see it as an issue which has no solution."³⁹⁸

Although one notes that the earlier choices that were made under the influence, even after independence, of the British advisors did not blend well with the reality of Islam in Malaysia, a pattern was set nevertheless whereby English law and judicial system were institutionalised during colonial rule in Malaysia. That pattern has now become entrenched and proved even convenient given the multi-religious and multi-racial composition of the Malaysian society. Official secularism has survived in Malaysia due partly to the fact that it offered a neutral ground and it seems to be here to stay over the foreseeable future – notwithstanding its foreign origin and divergence from the Sharī'a. Islam may thus be said to be strong at the grass root level among the Malays, but the

396 *The Star*, Kuala Lumpur, May 18, 1999, p. 4.

397 *Id.*

398 *The Star*, Kuala Lumpur, June 16, 1999, p. 2.

Sharī'a is relatively weak as a component part of the legal system outside the sphere of Muslim personal law. If the Syariah Courts were to enjoy independence within their jurisdictional sphere, as the 1988 constitutional amendment has envisaged, greater allocation of resources will be needed to raise the overall capabilities of the Syariah Courts to enable them to meet the demand for greater efficiency in their performance.

The focus now seems to be over reforming the Sharī'a itself through re-interpretation and development of a broader outlook of the values that are upheld by the Sharī'a. It is the higher goals and objectives of Sharī'a, the *maqāṣid al-Sharī'a*, reinterpretation and *ijtihād* which have received attention in the writings of the Prime Minister Dr. Mahathir and his former Deputy Anwar Ibrahim. This is a subject to which virtually no reference could be found in the relevant policy statements of Malaysian Prime Ministers and politicians of the earlier decades. But the subject has attracted much attention in the writings of Sharī'a scholars generally and a number of books especially by Arab scholars have appeared on the subject in recent years. Malaysian scholars have yet to be engaged in the subject and address issues in further detail. It may therefore be too early to say much as to the detailed implications of a *maqāṣid*-oriented polity in Malaysia. But for what has been said so far of the *maqāṣid al-Sharī'a*, it seems that Malaysia envisages a role for Islam and the Sharī'a at the level of its broader objectives, which would entail adherence to the spirit and rationale, if not to the letter, of the Sharī'a. The recent discourse over the *maqāṣid*, or the goals and objectives of Sharī'a, tends to fit in well with the general profile of the Islamisation policy of Malaysia during the Mahathir administration. The policy orientation here have decidedly been associated with the broader goals and values of Islam rather

than its specific laws or commitment to a clearly identified agenda. The general objectives or *maqāṣid* of Sharī'a such as justice, public welfare (*maṣlaḥa*) and protection of the essential values of faith, life, property, family and intellect, are generally well-known through the works, for example, of al-Ghazali, al-Shāṭibi, Ibn 'Āshūr and many others. Yet this general identification of objectives may need to be articulated and further specified in relationship to particular themes, laws and policies. This may well be the line of research that engages Malaysian and other jurists and specialists of Sharī'a in the years to come. The *maqāṣid*-oriented discourse that is likely to develop within or outside Malaysia may succeed and may even provide a new perspective and paradigm as to how a modern nation-state can identify with, and relate its policies and programmes to, the *maqāṣid al-Sharī'a*.

Since matters pertaining to Islamic law and religion are administered at the state level in Malaysia, it would follow that for the time being the Council of Religious Affairs and the *mufti* in every state are entrusted with *fatwa*. There were instances in recent years of *fatwa* that were issued by these councils in the Federal Territory and elsewhere over certain issues such as smoking, participation in beauty contests, and whether prospective spouses should be required to declare if they are HIV-AIDS carriers, and so on. But these *fatwas* have hitherto been fairly limited in scope and number and have generally operated on the margins of the legal system.

The basic rudiments of a structure for interpretation and *fatwa* would thus appear to be available in almost every state in Malaysia. The question remains, however, whether the existing facilities and the Sharī'a-related expertise that are currently available at the state level can be expected to respond effectively to the need for reinterpretation and *ijtihad* of the kind that Dr. Mahathir and Anwar Ibrahim have underlined. I

am in agreement with their views in so far as they have underlined the need for new approaches to interpretation and *maqāṣid*-oriented *ijtihād* that derives its substance directly from the sources of Sharī'a and is equally direct in addressing the issues of contemporary life. Yet I remain somewhat uncertain as to whether the available resources and expertise in the Sharī'a-related institutions and programmes may be somewhat too under-developed to respond to such demands and in need perhaps of overall upgrading before they can reasonably be expected to make re-interpretation and reform an engaging process and reality of the Islamic judiciary in Malaysia. There is also a need, perhaps, to re-examine the existing state laws and administration of Muslim Law Enactments and ascertain whether they do, in fact, encourage re-interpretation, adaptation to social reality and growth and whether or not they seek to impose unwarranted restrictions on the activities of judges, Muslim scholars and ulema. Do they engage the Syariah Courts in a lively process of self-development and growth through the internal mechanisms of appeal, *fatwa* and introduction of administrative reform? If there is agreement to upgrade the administration of the Sharī'a, then it is time perhaps that it should be translated into relevant policy measures and legislation.

The International Islamic University Malaysia is currently engaged in training prospective Sharī'a scholars and graduates who are also competent in modern law, and that is, of course, a step in the right direction. This university might consider it worthwhile to take additional measures to facilitate advanced levels of *ijtihād*-oriented specialisation in the Sharī'a-related disciplines both in Malaysia and in cooperation with other universities abroad. There is also a need perhaps to re-examine and upgrade the *fatwa*-issuance capabilities of the councils of religious affairs at both the state and federal levels. A fortified

and reinvigorated *fatwa* council at the state level and a fresh level of cooperation and networking between them at the national level may enhance their capabilities to address issues of common concern. The Islamic judiciary in Malaysia is too fragmented at present to be capable of taking reformist initiatives. It is also not independent of the civil courts which are vested with wider powers often impinging on the jurisdiction of the Syariah Courts. The 1988 constitutional amendment has actually not achieved its own declared objective and a need may be said to exist for a fresh attempt at the level of the constitution to articulate in further detail the status and jurisdiction of the Syariah Courts. A constitutional reform to raise the status of the Syariah Courts from the state courts to federal courts and then to unify them into an integrated system of national courts would seem the right step to take. Cooperation between the states to enable the existing Sharī'a-based institutions to pool their resources together and address issues of common concern can perhaps be addressed by the Conference of Rulers to devise a mechanism for effective liaison and communication between the council of religious affairs, the *fatwa* committees and Syariah Courts.

The Islamic Family Law Reform (Federal Territories) Act 1994 is an embodiment, on the whole, of folding back of the reforms that were introduced and then revoked for evidently no compelling reason that could relate to the realities of social and family life in Malaysia. There has been little basic evidence to suggest that the initial reforms that were earlier introduced had given rise to new problems or had adverse effects on the health and stability of the family institution among Malaysian Muslims. One might speculate, perhaps, and say that the conservative backlash that has been seen was probably instigated by the somewhat belated effects in Malaysia of the general phenomenon of Islamic revivalism, and the prevailing

Malaysian political climate, perhaps, during the 1990s. In particular the rise to power of the PAS Islamic party in Kelantan and the fresh challenge it has presented to the Islamic credentials of the federal government in Kuala Lumpur.

Islam is well entrenched in Malaysian politics, so much so that any nationalist government here would have little choice but to make Islam an important part of its agenda in order to maintain voter and constituency support at the grass root level. The renewed emphasis that the era of Islamic revival has placed on Islam has merely served as a reminder to convince Malaysian leadership of a basic reality of national life that needed to be more openly addressed. There are limitations on the Shari'a but Islam as a way of life is likely to remain strong above and beyond the level of partisan politics. Islam is essentially not a communalist religion even though it has acquired communalist overtones in Malaysia.

Notwithstanding the conservative reaction to the initial Islamic Family Law (IFL) reforms of 1984, the basic tenor and egalitarian substance of those reforms and their proximity to the letter and spirit of Qur'anic teachings on polygamy and divorce have not been challenged. This is the substance, in fact, of many of the critical observations on these amendments that were examined in this book. The IFL amendments in 1994 seemed to have been politically inspired due probably to an uptrend in conservative influences in Parliament and UMNO, and the international current of events, rather than shortcomings on the level of popular reception and implementation of the principal Act.

There are often suggestions for change consisting of a fresh demand to reinstate the original reforms and also a call for additional refinements which were discussed in appropriate places as the discussion proceeded and need not be repeated here. I propose, however, to end my presentation with some

suggestions for consolidation in the administration of Islamic law in Malaysia, which is clearly fragmented. The general picture I have presented of the IFL in Malaysia is one of conflicting jurisdictions, disparity and divergence, which hardly fails to provide a cause for concern. Yet, for those who wish to see a positive side to this picture, it may be the distinctive approaches that the various states of Malaysia have taken to the administration of Islamic law in their respective jurisdictions. Since Islam is an integral part of the Malay identity, the approaches taken toward the implementation of Islamic law are also seen as a part, perhaps, of that identity. There may be some persuasive force in this, but it seems that the course of events has been rather too strongly influenced by the forces of separation, exceptionalism and preservation of the political sovereignty of the Malay Rulers. The view has thus prevailed that the people's interests are better served through diversity and separation. Colonial rule favoured this pattern and encouraged its recognition under the constitutional mandate which made Islamic law a state matter in Malaysia. But discordance and separation has been an enervating factor in the successful administration of the *Sharī'a* and tended to diminish the potential of unity and coherence where these were necessary. The Syariah Courts were thus unable to develop their resources and also unable to respond to the demand for efficiency in their proceedings. Advanced levels of *Sharī'a* knowledge and institutional skills that are expected of the mainstream judiciary in Malaysia have lagged behind in the Syariah Courts.

Justice and equality are the cherished values of both Islamic law and secular legislation and they are inherently holistic and unitarian. There is no inherent need for bifurcation and division of justice under the Islamic and statutory laws of Malaysia. For the Islamic perception of justice is no

different to what it has meant in other great traditions. Malaysia may consider a reorganisation of its judiciary along the lines that are taken perhaps by Egypt and the Sudan by having a system of unified national courts that are committed to the same standards of efficiency and diligence in the service of justice, but may decide to have Sharī'a benches within the general structure of a unified judiciary. This would also necessitate substantive uniformity in the administration of Islamic law for the whole of Malaysia. This corporate merger, if I may use the expression, may even prove to be economically more cost-effective. Within a general plan for uniformity, the Malaysian judiciary may devise a structure that is best suited to the demographic realities of religious and cultural pluralism to which Malaysia is clearly committed. Islamic law and the Sharī'a system of adjudication may still apply only to the Muslims and the realities of a multi-religious society can still be acknowledged and sustained even if Malaysia takes a unified approach to the administration of Islamic law throughout its territorial domain.

There is basically no serious issue over the status of non-Muslims in Malaysia. The 1969 riots and ethnic violence that was experienced as a result were a shock to the nation but also impressed on the leadership the urgency of addressing the issues of equality and social justice. The decades of subsequent developments at the level of national planning and economic policy seem to have yielded favourable results. The general climate of ethnic relations in the country has witnessed marked relaxation and improvement during the three decades since 1969. Economic success on the one hand and skilful handling of the ethnic situation by the government have been the key factors in achieving those results. This I can say from my personal experience of having lived and worked for fourteen years in Malaysia. If the basic cause of the 1969 riots could be

said to have been the underprivileged status of the Malays, that issue has been addressed and much improvement has been reported over the years in the development of a Malay entrepreneurial sector that has made its presence noticeable in the private sector and corporate leadership. There may still be room for some improvement here but the next phase of this successful experience would hopefully be a policy that recognises no special privileges nor disadvantages for any particular group or section of the population at the level of national policy and legislation. Issues of disparity and participation levels at the various sectors of the economy should then be left to the business organisations and regulatory associations themselves. If one can give a successful account of the more difficult part of Malaysia's experience of the past three decades in working toward a state of equilibrium in ethnic relations, this is a cause for optimism to enable one to look forward to further improvement along similar lines. Malaysian political parties and component organisations of the National Front, the *Barisan Nasional*, have been able to remain together and work toward greater coordination. This too has been a successful experience. The question as to whether Malaysian politics will in the foreseeable future leave its phase of experience in communal politics toward national politics at the level of political party agenda and programme as well as the national leadership level remains a challenge that requires to be carefully addressed by all the parties concerned. This is an area where significant development could not be expected without addressing a number of issues that came in the way of economic equilibrium among the ethnic groups and issues of concern to social justice. Having made strident progress in fighting poverty among the Malays and narrowing the gap in economic differentials among the major ethnic groups, the stage is now in sight where Malaysia can take up a

comprehensive programme of social cohesion and national unity at all levels. If this were to happen one can say with confidence that it will have a positive impact on the status of Islam and the Sharī'a as this will benefit from improvement in the climate of understanding and tolerance among the ethnic groups. In the past, even if the Malays reasserted their Islamic heritage as an expression of their desire for self-development without wishing to undermine the status of the Chinese and Indian communities, the latter were inclined to see such development with fear and suspicion against their own cultural identity. This pattern of perceived fear and suspicion has existed and although it has been considerably reduced as a result of favourable developments in the past three decades, they are not far below the surface and are easily revived when there is talk of the Islamic state and wider enforcement of the Sharī'a. The next phase of development will hopefully be a confidence-building experiment whereby every ethnic and religious group in Malaysia can look forward to a pattern of relations when the desire for self-expression and revival of Islamic heritage on the part of the Muslims of Malaysia is not perceived as a threat to the cultural and religious identities of other groups. For, after all, this is a familiar experience of the era of Islamic revival beyond the Malaysian borders whereby Muslims have reasserted their identity and heritage following the era of colonial suppression and its aftermath in the earlier decades of the twentieth century. This is a general pattern of the experience of Muslims in recent decades, but when it is manifested in the Malaysian context, it tends to acquire an ethnic and communalist dimension. It would seem quite likely, one might say, that Islamisation would have come to Malaysia, in one form or another, even if Malaysia were home to a Muslim-only population, just as it has happened in so many other Muslim countries. Nor can it be said that Islamisation

has been a problem-free experience in the Muslim countries generally, for dissention and disunity have existed among the Muslims themselves. Ethnic pluralism in Malaysia may even be seen a positive factor in contributing to the climate of moderation that has, on the whole, prevailed throughout the decades of Islamic resurgence. Living in a multi-religious and multi-cultural society is in many ways an educational experience in widening one's horizons of tolerance. It is a fact that Malaysia's experience of Islamisation has been a peaceful one and even if it has occasionally brought to the surface insecurity and fear on the part of non-Muslims, it has still been a learning experience that one hopes, in the final analysis, will contribute to social harmony. Given the continuity of this favourable pattern of ethnic relations and the generally peaceful experience of Islamisation during the past three decades, prospects for piecemeal developments to further improve and refine the status of Sharī'a-related legislation seem positive. Islamisation in Malaysia is likely to be mild and move abreast of the realities of the pluralist society, and this may even prove to be the likely course over the pattern of development elsewhere in the Muslim world. The years of intense experimentation in Islamic resurgence may be giving way to a pattern of graduality and pragmatism which will be reassuring and supportive of the pace of development in Malaysia.

Issues that are encountered over the guardianship of infants and the frustrations of mothers who have custody of young children but are not recognised as legal guardians present a case, as already discussed, for a review and amendment of both the Islamic Family Law Act 1984 and the relevant provisions of the Guardianship of Infants Act 1961. With regard to the former, the proposed amendment should eliminate the unnecessary distinction between *ḥadānah* and *wilāyah* and recognise similar rights for both the parents. The

primary purpose of the proposed amendment should be the interest and welfare of the child and not necessarily the weakening or strengthening of the position of either of the parents. The person who has effective custody should also be recognised as legal guardian for all purposes that serve the benefit, upbringing, education and welfare of the child concerned. The father can still retain his capacity as guardian but not to the extent that would debilitate the mother who has effective custody from acting as legal guardian. The mother should thus be able to deal with issues such as school registration, identity card and passport-related matters on her own without there being a need for her to obtain the father's signature and consent especially in the event when there is a separation or divorce.

With regard to the proposed implementation of the *hudūd* under the Syariah Criminal Code 1993 of Kelantan, which still remains in abeyance, the experience should naturally echo the style and spirit of the Qur'ānic legislation during the early years of the advent of Islam. It is instructive to note here that most of these penalties were revealed in sura al-Mā'idah, which came at the very last stages of the revelation of the Qur'ān. The introduction of these penalties were thus postponed to the final years of the Prophet's mission and were revealed at a time when the necessary preparations had been taken during the preceding twenty years or so of the commencement of the prophetic mission. The *hudūd* thus marked the final stages in the unfolding of Islam and implementation of its Sharī'a under the leadership of the Prophet. But the proposed legislation in Kelantan seems to be putting the *hudūd* first in its campaign for the implementation of the Sharī'a without having made the necessary preparation to implement the rest of the Sharī'a and ensure that the *hudūd* actually achieve their desired purpose. The purpose should

naturally be to administer justice and not to engage in enforcing the *hudūd* for the sake of enforcement. For the *hudūd*, like the rest of the Sharī'a, are goal-oriented and follow their stated objectives. The *hudūd* have become much too politicised and controversial and there is a lack of consensus between the federal and state governments as to whether they will secure justice under the present circumstances. This is also the conclusion that many contemporary scholars of Sharī'a have drawn generally with regard to the implementation of the *hudūd* in other Muslim countries. If theft is punished not by the mutilation of the hand, due generally to doubtful conditions, but by imprisonment, the basic goal and purpose of the Sharī'a, which is to administer criminal justice through the application a deterrent punishment, would still have been followed. But if the thief's hand is mutilated under general conditions of controversy and doubt, the goal and purpose of administering justice would not have been followed. A general commitment to the implementation of the Sharī'a as a whole, and establishment, one might say, of an Islamic polity, are the necessary preconditions of a comprehensive approach to the enforcement of the *hudūd*. The Kelantan administration is not a sovereign state as it has no control over matters in the rest of Malaysia and has itself to comply with the terms of the federal constitution in regard to the enforcement of the *hudūd*. Kelantan alone is not, in other words, in a position to make all the necessary preparations for the enforcement of *hudūd*. The preparation for *hudūd* must also start with a thorough review and amendment of the Syariah Criminal Code 1993. In my critical analysis of this document in the relevant chapter of this book, I have specified the changes that need to be made from a comprehensive *ijtihād*-oriented perspective before the Hudud Bill can be recommended for enforcement.

I have discussed apostasy (*riddah*) in a separate chapter,

and also in the context briefly of the Hudud Bill of Kelantan. This is partly because the issue over apostasy is not confined to Kelantan but has arisen in the context generally of Malaysia. The analysis that I have presented concerning apostasy is also espoused with an appeal that our approach to it should be *ijtihad*-oriented and comprehensive. The main issue that I have highlighted concerning apostasy in the Hudud Bill of Kelantan is basically the same that I have stated in my discussion of apostasy in the wider context of Malaysia, and beyond Malaysia for that matter. My main point here is that in the absence of a clear mandate in the Qur'ān and the circumstantial nature of the legislation in the Sunna, conventional juristic doctrine, which identified apostasy as a *hadd* offence and held it punishable by death is unproven and questionable. A fresh approach to the interpretation of Sharī'a concerning apostasy is therefore necessary. I have, in fact, discussed a long line of juristic opinion that numerous prominent ulema have taken from early times to the effect that apostasy is not a criminal offence, let alone it being a *hadd* offence. This is a sound position as it is in keeping with the Qur'ānic proclamations on freedom of religion and belief. Apostasy invokes, according to the numerous Qur'ānic proclamations, the wrath and displeasure of God Most High, but not a temporal punishment for it in this world. I have also discussed the evidence in the Sunna on apostasy and how it is open to interpretation, including, in this context, the views of some prominent commentators who have advanced the necessary analysis and interpretation but which have not been adopted by the majority opinion. This interpretation is now proposed to guide our own view of the evidence in the Sunna.

Coming to the present time, the general consensus of the larger part of the Muslim world today, as is manifested in the numerous constitutional proclamations over the freedom of

religion is, I believe, a true reflection of the Qur'ānic guidance on this issue. The Death penalty for apostasy, indeed any punishment for it for that matter, tends to violate the Qur'ānic mandate on freedom of religion, which is probably why death punishment for apostasy is not generally practised. This position is sound and preferable to the conventional and essentially superficial position that is adopted by the majority of schools of Islamic law and also by the Hudud Bill of Kelantan. Islam is a great religion and an impressive civilisational edifice that cannot be reduced to advocating contradictory positions over such a basic question on the manner of its own propagation and acceptance. "There shall be no compulsion in religion – *lā ikrāha fi'd-dīn*" is the final word on this and the Qur'ān has clearly said it. Any assertion that compromises the substance of this general and unqualified declaration should therefore be set aside and abandoned.

The latest controversy in March 1999 over the proposed denial by the Chief Minister of Kelantan to married women of the right to work is contrary to the prevailing custom (*'urf*) of Malaysia which has for a long time granted women that right. The equality clause of the federal constitution has also recognised women's equal right in this respect. Now for the Chief Minister of Kelantan to present the opposite view and give it Islamic credentials puts him in contravention of the constitution and general *'urf*. The former represents the ordinance of the *ūlu al-amr* and the latter the accepted *'urf* and custom of Malaysia, both of which are being ignored. In his capacity as a religious leader, Nik Aziz Mat is free, of course, to offer advice and recommendations over the matter, but not to make this the subject of a government ruling which he then proposes to enforce. The concern that he has voiced over the potential conflict of motherhood duties and employment, and the priority of the former over the latter, as

far as possible, is valid and merits attention, but the matter must be left to the choice and discretion of the mothers themselves. Some mothers may be in need of having a regular income through employment to enable them to support their offspring, in which case the Sharī'a grants them the choice to earn a living and no one, including a religious leader or government, is within their right to deny it. She may alternatively need to only occupy herself with part-time work to supplement her income, or if she has the means to support herself and her child, she may choose not to work at all and give her full attention to the welfare of her child. In the event of sufficiency of means and presence in the family of the husband and father who brings sufficient income by which to meet the welfare needs of the children, the mother is advised to devote herself to motherhood especially in the early years of the upbringing of children. But these are words of advice that may be acceptable to some whereas others may find them less than convenient or even unacceptable.

The analysis that I have presented of the Sharī'a position on women's right to work in this book establishes beyond doubt the basic right to work for men and women alike. The manner in which that right is utilised is, like all other rights, a privilege of the right bearer and not of anyone else to superimpose an opinion or interpretation over something which is a basic right of the individual.

Notwithstanding the fact that Islamic banking in Malaysia was introduced at a relatively later stage compared, for example, with Egypt, Sudan and Pakistan, Malaysia has emerged as a leading influence in this area. Islamic banking in Malaysia has successfully tackled the initial problems over the crisis of identity where Islamic banking was often equated with conventional banking named "Islamic". The success that has been achieved over a relatively short period of time as to the

diversification of banking products and inroads that were made into the potentially hostile territory that was dominated by the conventional banking sector has not come easy. But working its way through the earlier uncertainties has enabled Malaysia to turn a new page and address some of the more challenging issues of securitisation and the development of carefully designed instruments that can activate a secondary market in Islamic securities and investments as well as issues pertaining to the actualisation of an Islamic money market. Most of the preparatory steps toward these ends have been taken and the necessary regulatory framework for them is already at hand. The recent economic down-turn and currency turmoil which Malaysia has experienced alongside with its neighbours in the region during the late 1990s undoubtedly had severe implications for the banking industry and its economy as a whole. This turn of events has had equally debilitating effects on the capabilities of the Islamic banking sector to pursue the rapid pace of progress it had experienced in the first half of the 1990s. It is only in recent months that the economy began to show signs of recovery as of the first quarter of 1999. The Islamic banking sector has remained active nevertheless and the lessons that were learned from the crisis may even prove to be beneficial over the longer term. Islamic banking is still the weaker party in the "dual banking" system that now operates in Malaysia.

Dual banking in Malaysia, where the two banking systems operate side by side with one another, naturally demands efficiency and an unusual degree of resourcefulness on the part of the Islamic banks. Islamic banking operators have to be innovative to ensure that their products are either superior or at par with the conventional products. In a real sense, Islamic banking has no choice but to keep up with sophistication and advancement of the banking system. This

has proved to have been a positive factor that may explain why the Islamic banking industry and products in Malaysia are at a relatively more advanced stage compared to some of its peers elsewhere in the Muslim world. It seems that the inherent strength of Islamic banking is now being recognised and this is bound to encourage further progress to add on to the strength of an already proven record of achievement. In my discussion of the issues in Islamic banking, I have given an overview of the current situation where a certain disequilibrium exists due to excessive reliance on short-term trade financing as compared to an equity-based financing system that should involve medium and long term investment and also involvement in the production sector of the economy. I have also discussed issues over the legal framework of adjudication and jurisdiction of banking disputes, matters of concern over the pattern of the relationship of BIMB with the Central Bank, and issues relating to *takāful*. The general pattern of experience in Malaysia in these areas is such that the industry is engaged in the search for workable solutions to issues which are likely to be adopted as and when they become available, and it is hoped that this presentation would also play a supportive role in the on-going quest for appropriate solutions.

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Glossary

āḥad ḥadith : ḥadith transmitted by one or few transmitter that does not preclude a possible doubt in authenticity of ḥadith.

bayʿ bithaman ājil : deferred payment sale, or instalment sale.

ḍarar : harm, prejudice.

ḍarūrah : necessity of the kind that provides grounds of exemption from conformity to normal rules.

faqīh : a jurist who is learned in Islamic law.

fatwa : legal opinion concerning a particular issue.

fiqh : (lit. understanding), Islamic law and jurisprudence.

fuqahāʾ : plural of *faqīh*.

gharar : uncertainty and risk-taking, especially with reference to contracts and transactions in Islamic law.

ḥirābah : highway robbery, rebellion, and mutiny against a legitimate government.

ʿiddah : (lit counting), waiting period of about three menstrual cycles that a divorced woman has to observe.

ijārah : a leasing contract, lease and hire.

ijmāʿ : consensus of opinion, especially of those learned in Sharīʿa over a legal or religious ruling.

ijtihād : lit 'exertion' and technically the effort a jurist makes in order to deduce the law, which is not self-evident, from the source evidence of Sharīʿa.

jumhūr : the vast majority of Muslim scholars, majority opinion.

khulʿ : a form of divorce in Islamic law which is initiated by the wife.

madhhab : school of law and theology.

maysir : gambling.

muhzan : a married person.

mubāraʿa : divorced by mutual agreement.

- muḍāraba* : business partnership wherein one party invests capital and the other operates the investment.
- muṭahid* : a competent scholar who is capable of conducting independent legal reasoning, or *ijtihād*.
- mukallaf* : a competent person in possession of his or her normal facilities.
- murābaḥa* : cost plus profit sale in which the seller informs the buyer of his cost and profit.
- mushāraka* : partnership between two or more persons for business purposes.
- mut'ah* : a consolation gift given to a divorced woman by her estranged husband. It also means temporary marriage, which is permissible only under Shi'i law.
- mutawātir* : lit. recurrent and continuous, hadith of proven authenticity that is transmitted by a large number of transmitters.
- rajm* : lapidation, death by stoning.
- ribā* : usury, charging of interest on credit.
- riddah* : apostasy, renunciation of one's faith.
- rij'ah* : revocation of a divorce before it becomes final.
- shurb* : wine drinking.
- ta'āwun* : cooperation in good work.
- tabarru'āt* : charitable contracts, such as gift and bequest.
- tafrīq* : judicial separation, judicial divorce.
- takāful* : mutual support, as in *takāful* insurance, which involves cooperation among participants.
- takhṣīṣ* : specification of a general ruling or text.
- ṭalāq* : divorce by the husband.
- ṭalāq al-ta'īq* : suspended divorce.
- taqlīd* : imitation, indiscriminate following of other people's opinion.
- uṣūl al-fiqh* : roots of Islamic law, the science of the sources of law in Islam.

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Islamic revivalism in the latter part of the twentieth century generated fresh interest in the application of Shari'a to areas that were previously governed by statutory legislation of non-Shari'a origin. Malaysia has consequently experienced a revival of interest in the Islamic law of transactions, Islamic banking and insurance. Steps have also been taken to enhance the status of the Syariah courts to enable them to operate as independent tribunals side by side with the civil courts. On the Islamic education front, Malaysia became home to the establishment of an Islamic university, and interest in the revival of Shari'a criminal law has been manifested in the Hudud Bill of Kelantan, 1993, which has, however, become controversial and still remains in abeyance. Terengganu has proposed the *Kharāj* to be levied on non-Muslims. These are some of the new areas where fresh interest is being shown in the Shari'a, in addition that is, to the Islamic family law which has always been the applied law of the land for the Muslims of Malaysia.

These developments have taken place in an inquisitive environment where questions were being asked as to how best could the Shari'a accommodate the realities of contemporary society. Political leaders, legislators and the ulema of Malaysia have been faced with the reality of Islam in Malaysia on the one hand and of balancing that concern within the context of a multi-religious and multi-racial society on the other.

This book addresses Shari'a-related issues that Malaysia has experienced in recent decades, especially since the 1970s when Islam became a more visible aspect of government policy. The quest for relevant answers to Shari'a law reform through *ijtihad* and other issues of concern to society is bound to be a continuing preoccupation of every representative government in this country. This book is a modest contribution to this continuing search for balanced approaches to Shari'a-related issues.

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